

PARSING PARENTHOOD

by
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The story public family law tells about parenthood is both inaccurate and normatively misguided. Parents are deemed “bad” because of their need for state support, and the parent–child relationship is accordingly devalued. This devaluation has resulted in costly and ineffective child welfare policies, embodied in the Adoption and Safe Families Act (ASFA) and related state laws. Child maltreatment costs an estimated \$103.8 billion annually, yet its incidence is not decreasing. Thousands of youth “age out” of foster care each year as legal orphans, with no connection to a family and very poor prospects.

This Article explores the consequences of this flawed framework, including the failure to recognize the socioeconomic factors underlying most child maltreatment and the disregard for the real ties between parents and children after families are separated. It argues that child welfare policies will not succeed until the underlying parenthood framework changes; implicit cognitive biases channel even new interventions in a way that stigmatizes marginalized families and over-prioritizes adoption as a panacea. This Article concludes by considering some promising paths to remapping public parenthood, incorporating lessons from the public health preventive approach and from the private family law system’s disaggregation of parental rights and responsibilities.

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INTRODUCTION

The child welfare system is broken.¹ More than 400,000 children a year are in foster care,² but most come out of the system worse off than if they had stayed in their original homes.³ The direct and indirect costs of child maltreatment are estimated to be a staggering \$103.8 billion annu-

¹ See, e.g., *Issue Brief: Rebuild the Nation's Child Welfare System*, ANNIE E. CASEY FOUND. 1 (Jan. 2009), http://www.aecf.org/~media/PublicationFiles/Child_Welfare_issuebrief2.pdf.

² *The AFCARS Report: Preliminary FY 2011 Estimates as of July 2012*, CHILDREN'S BUREAU 1 (Jul. 12, 2012) [hereinafter *AFCARS 2011*], <http://www.acf.hhs.gov/sites/default/files/cb/afcarsreport19.pdf>.

³ See the discussion of the poor outcomes for children in foster care *infra* Part I.B.2.a.

ally.⁴ And yet the problem of child maltreatment persists, and our approaches to it seem stagnant and even futile.⁵

This Article argues that the assumptions about parenthood underlying the child welfare system are both inaccurate and normatively misguided. As a result, the statutory scheme governing child welfare, the Adoption and Safe Families Act (ASFA),⁶ is flawed in two important ways. It fails to recognize the socioeconomic factors underlying most child maltreatment and instead defines maltreatment primarily based upon normative parental behavior standards unrelated to child safety. It also ignores the real ties that exist between parents and children even after children have been removed from their parents' care, thereby channeling thousands of parents out of parenthood altogether.⁷ Consequently, the legal system addresses child maltreatment in an ineffective, post-hoc fashion in stark contrast to the medical community's preventive approach to the problem.⁸ The failure to parse out parental rights in this context has led to perhaps ASFA's most disturbing legacy—over a hundred thousand “legal orphans.”⁹

⁴ CHING-TUNG WANG & JOHN HOLTON, PREVENT CHILD ABUSE AM., TOTAL ESTIMATED COST OF CHILD ABUSE AND NEGLECT IN THE UNITED STATES 1–2 (2007), http://www.preventchildabuse.org/about_us/media_releases/pcaa_pew_economic_impact_study_final.pdf (estimating the total annual costs of child maltreatment in 2007 including direct costs such as foster care and court oversight and indirect costs such as lost productivity and future health problems). I use the term child maltreatment instead of abuse and neglect, as it is more inclusive and neutral while being equally descriptive. Abuse in particular is a very loaded term and does not reflect the majority of cases in the child welfare system. See *infra* Part I.B.2.a. As I argue below, the terms in which social issues are framed are very significant to how we as a society understand and address them.

⁵ See, e.g., *Issue Brief: Rebuild the Nation's Child Welfare System*, *supra* note 1, at 1.

⁶ Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified in scattered sections of 42 U.S.C.).

⁷ The majority of maltreatment cases involve neglect, rather than sexual or physical abuse. CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD MALTREATMENT 2009, at 23 & fig.3–4 (2010), available at <http://archive.acf.hhs.gov/programs/cb/pubs/cm09/cm09.pdf>. The interventions discussed herein apply primarily to neglect cases, although some of my conclusions, such as the importance of preserving family ties even after children are removed from their parents' care, apply to all types of cases.

⁸ The medical community, including the Centers for Disease Control and Prevention (CDC) and the American Psychological Association (APA), has defined child maltreatment as a preventable public health problem. See AM. PSYCHOLOGICAL ASS'N, EFFECTIVE STRATEGIES TO SUPPORT POSITIVE PARENTING IN COMMUNITY HEALTH CENTERS 1 (2009) [hereinafter APA], available at <http://www.apa.org/pi/prevent-violence/resources/positive-parenting.pdf> (reporting findings of a study commissioned by the CDC).

⁹ The phrase “legal orphans” refers to children whose parents' rights have been terminated but who will not be adopted, and so will likely age out of foster care alone with very poor future prospects. See *infra* Part I.B.2.b.

The system's flaws bring other significant consequences, both instrumental and expressive.¹⁰ First, the current legal framework does not represent how people really live, even though representing how people live is a stated goal of family law. Second, it has resulted in costly and ineffective child welfare policies that neither reduce child maltreatment nor provide family stability and permanency for many children.¹¹ Third, it results in disparities between the treatment of public law and private law families, although the only real difference between most of these families is income. Private family law focuses on the private distribution of wealth and applies primarily to middle and upper class families, while public family law concerns state public benefits systems and thus generally applies to lower income people.¹² Private family law assumes the interests of parents and children are aligned and protects their ties to each other, despite parental misconduct. In contrast, public family law parents are deemed "bad" because of their need, or perceived need, for state intervention, and their rights are accordingly limited. Essentially, the public parenthood framework conveys disdain for the many parents who need state support to raise their children.¹³

Yet these mistaken assumptions about parenthood and child maltreatment, what I will term child welfare's "public policy story," continue to shape the law's response to this social problem. Scholars have proposed different approaches, including variously prioritizing reunification¹⁴ or adoption,¹⁵ focusing on problem solving¹⁶ or prevention.¹⁷ Yet

¹⁰ Carl Schneider outlined the five functions of family law, including the expressive and channeling functions. See Carl E. Schneider, *The Channeling Function in Family Law*, 20 HOFSTRA L. REV. 495 (1992). Channeling refers to the law's support of social institutions, such as marriage or parenthood, believed to be desirable for society as a whole, and the encouragement of people to enter into these institutions. *Id.* at 505–07. As to the expressive function of family law, Mary Ann Glendon explains that the law "tells stories about the culture that helped to shape it and which it in turn helps to shape. . . . Indeed, it may be that law affects our lives at least as much by these stories as it does by the specific rules, standards, institutions, and procedures of which it is composed." MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* 8 (1987).

¹¹ Permanency for children is the guiding principle of child welfare policy under the ASFA statutory structure. How one defines permanency can significantly alter the treatment of biological, foster, and adoptive families. See *infra* Part I.A.2.b.

¹² Here I focus on the child welfare system, the government system responsible for addressing child maltreatment, including the foster care and public adoption systems.

¹³ See Richard H. Pildes, *The Unintended Cultural Consequences of Public Policy: A Comment on the Symposium*, 89 MICH. L. REV. 936, 942 (1991) ("Public programs, in other words, do not just *do* things in the sense of providing benefits or offering services. They also *mean* something, whether this meaning is talked about in terms of their expressive character [or] their role in sustaining and creating a particular public culture . . .").

¹⁴ See, e.g., Martin Guggenheim, *Somebody's Children: Sustaining the Family's Place in Child Welfare Policy*, 113 HARV. L. REV. 1716 (2000) (book review).

while parenthood has been the subject of active debate recently in private family law, little scholarly attention has been accorded the construction of parenthood in public family law.¹⁸ This Article aims to advance this dialogue by explaining the tenacity of the “bad” parent public policy story. It looks to implicit social cognition theory, a literature largely new to family law, to explain why these mistaken child welfare policies persist and impede innovative efforts to address child maltreatment.

Implicit cognition scholars have demonstrated that unconscious biases can influence both how key decision-makers, such as judges and caseworkers, make decisions, and how society at large frames and addresses a problem.¹⁹ Stock stories and stereotypes result in the blaming of individual actors, particularly non-normative ones, for social problems, while allowing our socio-legal system to be legitimated as just and rational. Confirmation bias and the availability heuristic prevent individual cases or larger social problems from being viewed objectively or afresh—the lens through which a problem is viewed can virtually determine the choice of solution. I argue that the child welfare system is particularly susceptible to these implicit biases because of the pervasive judgment about parenting in our society, the racial and class marginalization of parents involved in the child welfare system, the difficulty of addressing the complex problem of child maltreatment, and the myopic focus on adoption²⁰ as a panacea for every child in foster care. By suggesting that implicit biases may be shaping our response to child maltreatment, this Article concludes that the public parenthood story must change before fair and effective child welfare policies can be implemented.

The Article proceeds in four parts. Part I outlines the two-tiered parenthood framework in private and public family law. It challenges the widespread public policy story that individual parental misconduct causes child maltreatment and demonstrates how this flawed discourse results in ineffective child welfare policies and the devaluation of many families. Part II posits that social cognition theory can help explain the persistence of the flawed public parenthood story. The irrational human tendency to

¹⁵ See, e.g., ELIZABETH BARTHOLET, *NOBODY’S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE* (1999).

¹⁶ See, e.g., Clare Huntington, *Rights Myopia in Child Welfare*, 53 *UCLA L. REV.* 637 (2006).

¹⁷ See, e.g., Marsha Garrison, *Reforming Child Protection: A Public Health Perspective*, 12 *VA. J. SOC. POL’Y & L.* 590 (2005).

¹⁸ See, e.g., Melanie B. Jacobs, *Why Just Two? Disaggregating Traditional Parental Rights and Responsibilities To Recognize Multiple Parents*, 9 *J.L. & FAM. STUD.* 309 (2007).

¹⁹ See, e.g., Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 *WM. & MARY L. REV.* 1587, 1592–93 (2006); see also *infra* notes 120–46 and accompanying text (outlining implicit cognition literature).

²⁰ I use adoption here to refer to traditional closed adoption wherein a child’s adoption severs all legal ties and communication with her family of origin. In contrast, open adoption allows a child’s family of origin to have ongoing contact with the child post-adoption.

“blame the other” and to desire simplistic solutions over complex realities applies only too well to the non-normative families in the child welfare system. Part III describes two recent trends in child welfare policy: subsidized guardianship and reinstatement of parental rights statutes.²¹ It suggests that these innovations will not fulfill their promise because implicit biases have shaped them to adhere to the old, flawed parenthood framework. Part IV concludes by outlining some thoughts on remapping public parenthood, including reframing child maltreatment as a social problem to be approached preventively and expanding our concepts of permanency, while parsing out parenthood.

I. TWO TIERS OF PARENTHOOD

Parenthood, like childhood, is a socio-legal construct created based on cultural norms. And the construct of parents is very different in the public family law system from that in the private family law system.²² The following two cases illustrate these two tiers of parenthood. Typical of the private law realm is this recent custody case: CCW and JSW, an “affluent” couple, divorced when their sons were 11 and 13 years old.²³ The court noted approvingly that the children had attended private school and “costly sleep-away camp” as well as traveled on “numerous national and international vacations.”²⁴ The father JSW, a former police officer, disciplined the children physically, including using “nerve locks,” pinching, cold showers, and yelling.²⁵ He also assaulted the mother in front of the children and was diagnosed with several mental illnesses.²⁶ Nonetheless, the court granted him shared physical and legal custody.²⁷

²¹ I will use the same terminology as the statutory frameworks. Accordingly, reunification refers to a child being returned to her parent before a termination of parental rights, whereas reinstatement refers to a child being returned to her parent, and the parent’s rights being reinstated, after a termination. I support reinstatement statutes out of a pragmatic concern for the many legal orphans and other youth who will age out of foster care with no connection to an adult. Yet the whole notion of “reinstating” parental rights which were terminated in the name of finality and permanency for children is nonsensical and illustrates the extent to which the current system is broken.

²² A number of scholars have pointed out the two-tiered system of public and private family law, beginning with Jacobus tenBroek’s seminal article. See Jacobus tenBroek, *California’s Dual System of Family Law: Its Origin, Development, and Present Status*, 16 STAN. L. REV. 257 (1964); see also Marsha Garrison, *Parents’ Rights vs. Children’s Interests: The Case of the Foster Child*, 22 N.Y.U. REV. L. & SOC. CHANGE 371 (1996) (noting this in the private custody versus public child welfare context); Jill Elaine Hasday, *Parenthood Divided: A Legal History of the Bifurcated Law of Parental Relations*, 90 GEO. L.J. 299 (2002).

²³ These facts are taken from C.C.W. v. J.S.W., No. 2004/004422, 2006 WL 4549771, at *1, 2 (N.Y. Sup. Jan. 3, 2006).

²⁴ *Id.* at *3.

²⁵ *Id.*

²⁶ *Id.* at *4.

²⁷ *Id.* at *9.

A typical public law case proceeded quite differently. Timothy W., his twin brother Jesse, and their sister were removed from their low-income mother and put in foster care when they were 10 and 6 years old, respectively.²⁸ They were removed because their mother, EW, had been in an alcohol-related auto accident with her children, in which no one was injured, and had allegedly not attended adequately to the children's dental care. Although EW completed treatment and was deferred prosecution, her parental rights were terminated. Her daughter was adopted, but Tim and Jesse did not fare well in foster care: they dropped out of school in seventh grade, were sometimes homeless, abused drugs, and Jesse ended up in juvenile prison for burglary. Both boys repeatedly asserted their desire to return to their mother and ran away to her home.

The disparate result in these two cases is best explained by the framing of the situation from the start as a private or public family law case. The private family law system reflects the idealized vision of the caring mother and accords parents strong rights over their children. Accordingly, parenthood in this realm exists on a continuum; for instance, custody is often shared between parents, and even a flawed parent such as JSW is almost always granted visitation and other rights to his child. Public family law parents such as EW, in contrast, are designated "bad" by the very fact of their needing state support to raise their children. As a result, their relationships with their children are devalued and their rights rarely parsed. This focus on individual parental pathology as a cause of child maltreatment has led to ineffective and costly child welfare policies.

A. *The Nuanced View of Parenthood in Private Family Law*

The usual story of parental rights reflects the fundamental nature of a parent's freedom to raise her child as she sees fit.²⁹ As the Supreme Court has repeatedly confirmed that "[the] primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."³⁰ Parents are presumed to act with their children's best interests in mind, reflecting the widespread view of the good parent as one whose "natural bonds of affection lead [her] to act in the best interests of [her] children."³¹ Accordingly, parents are free to

²⁸ These facts are based on the family profiled in two articles: Maureen O'Hagan, *Kids Try to Reunite with Parents*, SEATTLE TIMES, Aug. 7, 2007, at B1; Josh Farley, *Boys Removed from Home Petition Court to Leave Foster Care*, KITSAP SUN (Aug. 6, 2007), <http://www.kitsapsun.com/news/2007/aug/06/boys-removed-from-home-petition-court-to-leave/>.

²⁹ See *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (recognizing a parent's right to raise her children as she sees fit as "perhaps the oldest of the fundamental liberty interests"); *Meyer v. Nebraska*, 262 U.S. 390, 400–01 (1923) (holding that parents may choose to have their children taught a language in addition to English in school).

³⁰ *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972).

³¹ *Parham v. J.R.*, 442 U.S. 584, 602 (1979).

raise their children as they see fit. The epitome of this vision is the self-sacrificing mother, who continues to be romanticized in both our socio-legal system and popular culture.³² It is a truism that this vision of the family does not reflect reality; most American families are not white and middle class with two parents. Yet this normative vision continues to guide family law.³³

Accordingly, custody and visitation are parsed in a nuanced fashion.³⁴ For instance, joint custody, both physical and, even more frequently, legal, has increased tremendously since the 1970s.³⁵ Some states have created a presumption in favor of joint custody.³⁶ The increasing recognition of functional parenthood by courts and in the American Law Institute's (ALI) Principles of the Law of Family Dissolution, as well as the concomitant award of rights to non-parent third parties, also illustrate this trend.³⁷ This disaggregation of rights among multiple parents reflects a broad understanding of permanency—children can be stable and thrive in a variety of living situations.

Courts in this realm very rarely deny visitation or even curtail it significantly out of the widespread recognition that having both parents maintain contact with the child and be involved in child rearing is good.³⁸

³² See Jennifer M. Collins, *Lady Madonna, Children at Your Feet: The Criminal Justice System's Romanticization of the Parent-child Relationship*, 93 IOWA L. REV. 131 (2007); see also SUSAN J. DOUGLAS & MEREDITH W. MICHAELS, *THE MOMMY MYTH: THE IDEALIZATION OF MOTHERHOOD AND HOW IT HAS UNDERMINED WOMEN* (2004).

³³ Jane C. Murphy, *Legal Images of Motherhood: Conflicting Definitions from Welfare Reform, Family, and Criminal Law*, 83 CORNELL L. REV. 688, 690–91 (1998).

³⁴ See, e.g., TEX. FAM. CODE ANN. § 153.001(a)(1) (West 2008); *In re Marriage of Hansen*, 733 N.W.2d 683, 693 (Iowa 2007).

³⁵ See, e.g., ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, *DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY* 107–08 (1992) (reporting on a California study of custody disputes between 1985 and 1989 that found that 79% of cases resulted in joint custody, even when neither parent requested it, up from 25% of cases before 1979).

³⁶ See, e.g., CAL. FAM. CODE § 3020(b) (West 2004); FLA. STAT. ANN. § 61.13(2)(b)(2) (West 2006).

³⁷ The most recent ALI Principles (2002) outline two categories of functional parents: parents by estoppel and de facto parents. AM. LAW INST., *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS* § 2.03(1)(b)–(c) (2002).

³⁸ See, e.g., *In re Sheavlier v. Melendrez*, 744 N.Y.S.2d 264, 266 (N.Y. App. Div. 2002) (“The denial of visitation to a noncustodial parent is a drastic remedy which may be ordered only in the presence of compelling reasons and substantial evidence that such visitations are detrimental to the child’s welfare.”); see also MO. ANN. STAT. § 452.375 (West 2002) (declaring “that it is the public policy of this state that frequent, continuing and meaningful contact with both parents after the parents have separated or [divorced] is in the best interest of the child”). In fact, some argue that private family law parenthood has become virtually indissoluble. Patrick Parkinson, *Family Law and the Indissolubility of Parenthood*, 40 FAM. L.Q. 237 (2006) (outlining the shift in various countries in the construction of post-divorce parenthood, including the U.S., towards an erosion of distinctions between the custodial and non-custodial parent).

This is so even where a parent has committed some wrongdoing.³⁹ Parents who have physically abused the other spouse, for example, are quite frequently granted joint or even sole custody, and almost always awarded visitation.⁴⁰ The parental rights of the large number of mothers and fathers who abuse alcohol are similarly left intact, despite the potential risk to children from this behavior.⁴¹

B. The “Bad Mother”⁴² Story in Public Family Law

The story of public parenthood is starkly different from the nuanced view of parenthood in custody cases, and rarely told. In the public realm, parents are seen as “immoral” “monsters” who brutalize their children.⁴³ Once a parent enters the child welfare system, often because she lacks resources, she is deemed a bad parent. As a bad parent, she alone is culpable for child maltreatment, and her children would be better off with a new, usually adoptive, family. In sum, the mere fact that a parent requires

³⁹ See Garrison, *supra* note 22, at 379 n.31 (citing studies of middle class divorcing families showing that significant percentages of the parents suffered from mental illness or had “profoundly troubled” relationships with their children); Robin Fretwell Wilson, *Children at Risk: The Sexual Exploitation of Female Children After Divorce*, 86 CORNELL L. REV. 251, 253–57, 265 n.52 (2001) (outlining data showing that parents in divorcing families engage in numerous behaviors potentially posing risks to children, including violence and substance abuse).

⁴⁰ Although domestic violence is now a custody consideration in most states, *see, e.g.*, CAL. FAM. CODE § 3044 (West 2004) (outlining a presumption against batterers), batterers continue to regularly secure visitation and custody. *See* Joan S. Meier, *Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining the Solutions*, 11 AM. U. J. GENDER SOC. POL’Y & L. 657, 662 & n.19 (2003) (reporting that courts quite frequently grant joint or even sole custody to batterers).

⁴¹ Nanette Reed, Comment, *Sacrificing the Child’s Best Interests: Judicial Custody Awards & Parental Alcohol Abuse*, 35 SW. U. L. REV. 111, 111, 127 n.104 (2005) (citing government data that approximately one in four children are exposed to alcoholism in their families, but noting that courts very rarely deny legal and physical custody to the offending parent). My point here is not to argue that the rights of flawed parents in the private law context should be more limited but rather to show the discrepancy between their treatment and the treatment of similar parents in the public law system.

⁴² In her seminal article, Professor Cooper Davis used the term “the good mother” to describe the idealized parent. Peggy Cooper Davis, *The Good Mother: A New Look at Psychological Parent Theory*, 22 N.Y.U. REV. L. & SOC. CHANGE 347 (1996). I focus on mothers here, as did Professor Cooper Davis, for most of the parents whose children are removed from their care are women. Moreover, the narrative of bad parenting that dominates child welfare is gendered in certain ways, punishing women for behavior that might not be problematic in men. For instance, women may be criticized for the partners they choose or for being perceived to have chosen a man over their children. *See, e.g.*, *In re T.J.*, No. 04-0684, 2004 WL 1396354, at *1 (Iowa Ct. App. June 23, 2004) (affirming a termination of parental rights despite mother’s progress because her relationship with an abusive man indicated a “decision to choose her paramour over her children’s interest”).

⁴³ Matthew I. Fraidin, *Stories Told and Untold: Confidentiality Laws and the Master Narrative of Child Welfare*, 63 ME. L. REV. 1, 2–3 (2010).

state support to raise her children causes her parenting to be subjected to excessive judgment and her relationship to her children to be ignored.⁴⁴ This flawed public policy story governs at every point of intervention, from investigations of alleged maltreatment to decisions about whether to remove a child because of maltreatment into foster care to ultimately, and most extremely, terminations of parental rights. And this story governs hundreds of thousands of families at any one time.⁴⁵

1. *The ASFA Statutory Scheme*

ASFA, the federal statutory scheme governing child welfare, both reflects and perpetuates this punitive vision of public parenthood.⁴⁶ ASFA was enacted largely to reduce the burgeoning number of children in long-term foster care “drift” and to expedite permanent homes for them.⁴⁷ These continue to be laudable goals that should guide child welfare policy today. Yet the legislative history surrounding ASFA’s passage, and its implementation in practice, reflect the flawed assumption that bad parenting alone is responsible for child maltreatment and that children from these families should accordingly be adopted.⁴⁸ At the time of ASFA’s enactment, parents in the public family law realm were viewed as deviant, even criminal, and thus were referred to as “perpetrators.”⁴⁹ As one Senator argued in supporting the statute’s excusal of state efforts to

⁴⁴ See LINDA GORDON, *PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE 1890–1935* (1994) (describing the public understanding of the very poor, primarily single mothers receiving public benefits as lazy, immoral, and largely responsible for their plight).

⁴⁵ It has been particularly harmful to children and parents who are farthest from the normative family ideal, such as older children or children with special needs who want ongoing contact with their birth parents rather than a closed adoption.

⁴⁶ See 42 U.S.C. §§ 629, 670–79 (2006). The focus here is on the federal child welfare statutory scheme because this dictates to a large degree what measures courts must take. See Vivek S. Sankaran, *Innovation Held Hostage: Has Federal Intervention Stifled Efforts to Reform the Child Welfare System?*, 41 U. MICH. J.L. REFORM 281, 287 (2007) (describing the stifling of court discretion and innovation in this realm as a result of the increasingly rigid federal statutory frameworks and concomitant funding streams). However, the public policy story of bad parenting also permeates the scarce published opinions in this realm. As one court recently put it: “[I]n a contest between a neurotic, dysfunctional, criminal, or otherwise marginal parent who, despite these qualities, can provide minimally adequate care for a child, on the one hand, and the state, which may have identified an adoptive placement where the child will probably thrive and flourish, on the other, the *bad parent* wins.” *In re L.G.T.*, 214 P.3d 1, 18–19 (Or. Ct. App. 2009) (Schuman, J., dissenting) (emphasis added).

⁴⁷ H.R. REP. NO. 105-77, at 12 (1997).

⁴⁸ The difficulty of collecting and measuring data in the family law context has been noted. See Schneider, *supra* note 10, at 517. Yet “*all* schemes of statutory regulation are ultimately based on unprovable assumptions about human nature.” *Id.* at 522. Here, I do not seek to empirically demonstrate that ASFA was inspired by a desire to punish certain types of parents, but rather to point out that this story of parenthood surrounded ASFA’s passage and that the result was a focus on channeling children into new, adoptive families.

⁴⁹ 143 CONG. REC. 25,438 (1997) (statement of Sen. Roth).

help families reunify: “[R]easonable efforts . . . ha[ve] come to mean efforts to reunite families which are *families in name only*. I am speaking now of *dangerous, abusive adults* who represent a threat to the health and safety and even the lives of these children.”⁵⁰

Accordingly, ASFA mandates terminations in many more cases, requiring termination where a child has spent 15 of the past 22 months in foster care.⁵¹ States that do not comply with this mandate are sanctioned through the denial of federal funds. ASFA also excuses states from aiding families to reunify in certain cases and prioritizes adoptions, bringing numerous new measures and funding sources to promote them.⁵² This funding scheme has created a skewed incentive system which prioritizes foster care and adoption rather than in-home services and reunification.⁵³ In sum, ASFA has created a “one-size-fits-all [child welfare] model which places poor children in foster care, terminates parental rights expeditiously and [in theory] locates adoptive homes immediately.”⁵⁴

2. *The Resultant Flawed Child Welfare Policies*

So what’s wrong with this story?² It seems sensible that parents who harm their children are bad and that these children would be better off with new families. The ASFA structure is simply enforcing appropriate conduct by families and protecting children under the state’s *parens patriae* authority.

Yet this story is based on assumptions unconnected to reality and thus is flawed in two significant ways: First, child maltreatment is defined as an individual moral problem and its social-environmental causes are ignored. Second, the relationship between these parents and their children is devalued and families are often unnecessarily disrupted. The legal framework ignores the real data about child maltreatment and family bonds, assigning causation and blame in a way that is not legitimated and is frequently harmful.

a. *Obscuration of the Real Picture of Child Maltreatment*

By positing parental character deficiencies and immorality as the causes of child maltreatment,⁵⁵ the public family law framework ignores

⁵⁰ 143 CONG. REC. 26,400 (1997) (statement of Sen. DeWine) (emphasis added).

⁵¹ 42 U.S.C. § 675.

⁵² *Id.* at §§ 671, 675. ASFA was also “expected to increase the number of adoptions” by expediting terminations of parental rights and providing adoption subsidies. H.R. REP. NO. 105-77, at 7.

⁵³ For instance, in FY 2010, a conservative estimate shows that the federal government allocated \$7 on foster care and \$4 on adoption for every \$1 spent on foster care prevention or reunification. *See* CHILD WELFARE LEAGUE OF AM., THE PRESIDENT’S FY 2010 BUDGET AND CHILDREN 2–3, 6–7 (2009), http://www.cwla.org/advocacy/FY2010_PresidentBudget_analysis.pdf.

⁵⁴ Sankaran, *supra* note 46, at 287.

⁵⁵ *See, e.g.*, Adoption of Warren, 693 N.E.2d 1021, 1026 (Mass. App. Ct. 1998) (holding that “the deficiencies of a parent’s character, temperament, capacity, or conduct” can be grounds for a termination of parental rights). A state senator

the real causes of most child maltreatment. The vast majority of child welfare cases are neglect, not abuse, cases: neglect accounts for nearly four fifths of cases nationally, including the majority of cases where a parent's rights are terminated.⁵⁶ Neglect includes both a lack of resources, such as housing and child care, and a very vague standard of parental conduct. One typical state statute defines neglect to include a parent who has failed to "provide adequate food, clothing, shelter . . . or supervision that a prudent parent would take" or where "[t]he child lacks proper parental care."⁵⁷ The vagueness of these standards leaves individual parents unaware of what behavior is expected of them, yet exposed to significant harms if they violate this standard.⁵⁸ It also significantly reduces the law's effectiveness as a shaper or reflection of social norms, for the behavioral expectations are unclear and hidden.⁵⁹

Moreover, the definition of neglect as a lack of resources results in a large correlation between maltreatment and poverty.⁶⁰ For instance, child

advocating for criminal prosecutions of mothers who drink alcohol or use drugs while pregnant describes motherhood in a similarly moralizing tone: "I look at the tens of millions of good mothers who make the right decisions. My mother, for instance, smoked forever. The day she found out she was pregnant with me, she put down her cigarettes for the last time. If we turn our back on this, we say to all these good mothers who have made good decisions that it's meaningless to society to be a good mother or a good father." Ada Calhoun, *The Criminalization of Bad Mothers*, NYTIMES.COM (Apr. 25, 2012), <http://www.nytimes.com/2012/04/29/magazine/the-criminalization-of-bad-mothers.html> (internal quotation marks omitted).

⁵⁶ CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, CHILD MALTREATMENT 2010, at 24 & fig. 3-6 (2011), available at <http://archive.acf.hhs.gov/programs/cb/pubs/cm10/cm10.pdf> (reporting that in 2010 78% of children reported to CPS were victims of neglect, 18% were victims of physical abuse, 9% were victims of sexual abuse, and 8% were victims of psychological abuse); see also CHILDREN'S BUREAU, *supra* note 7, at 23 & fig.3-4 (reporting that in 2009 78.3% of child maltreatment reports indicated neglect, while 17.8% indicated physical abuse, 9.5% indicated sexual abuse, and 7.6% indicated psychological maltreatment); Janet L. Wallace & Lisa R. Pruitt, *Judging Parents, Judging Place: Poverty, Rurality, and Termination of Parental Rights*, 77 MO. L. REV. 95, 112-13 (2012) (outlining the role of poverty in neglect findings and terminations of parental rights).

⁵⁷ COLO. REV. STAT. §§ 19-1-103, 19-3-102 (2012). Virtually every state's definition of neglect encompasses the failure to provide adequate resources to one's children. See, e.g., OKLA. STAT. ANN. tit. 10A, § 1-1-105 (West 2009) (defining neglect as "the failure . . . to provide . . . adequate nurturance and affection, food, clothing, shelter, sanitation, hygiene, or appropriate education").

⁵⁸ For an example of parents' understandable ignorance of the standards of child care expected of them, see the discussion of the Alabama case *infra* Part II.A.3.

⁵⁹ See Elizabeth S. Scott, *Social Norms and the Legal Regulation of Marriage*, 86 VA. L. REV. 1901, 1926 (2000) (outlining the law's role in "clarify[ing] and announc[ing] the specific behavioral expectations embodied in social norms").

⁶⁰ See Richard P. Barth et al., *Placement into Foster Care and the Interplay of Urbanicity, Child Behavior Problems, and Poverty*, 76 AM. J. ORTHOPSYCHIATRY 358 (2006). ASFA was passed only one year after the major welfare reform legislation, the Personal Responsibility and Work Opportunity Act (PRWORA), Pub. L. No. 104-193, 110 Stat. 2105 (1996), and legislators explicitly connected the two statutes, see, e.g., 143 CONG.

maltreatment is seven times more common in poor families, and most states identify poverty as one of the top two challenges facing child welfare-involved families.⁶¹ This correlation is so strong that child maltreatment appears to trend downwards during periods of economic prosperity and upwards during recession.⁶² And the lack of resources determines case outcomes: demonstrating this, repeated studies have shown that about 30% of foster children could be returned home if their parents could secure safe, affordable housing.⁶³ The relationship between poverty and child maltreatment is complex, and I am not claiming that low-income parents are more likely to abuse their children. Instead I am pointing out that, possibly because low-income families have fewer resources or are under greater state scrutiny, poverty is a risk factor for involvement in the child welfare system.⁶⁴ The current legal parenthood framework assigns causation to this correlation: parents themselves are blamed as bad parents for a lack of resources. In this way, the problem of child maltreatment is privatized, as our legal system privatizes other social problems.

The story of bad parents and the vagueness of neglect standards also means that a finding of child maltreatment often focuses on parental conduct that, while perhaps undesirable, does not cause proven harm to children.⁶⁵ As a result, children are routinely removed to foster care

REC. 25,438 (1997) (statement of Sen. Roth), which had a doubly harsh impact on low-income families.

⁶¹ ANDREA J. SEDLAK ET AL., U.S. DEP'T OF HEALTH & HUMAN SERVS., FOURTH NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT (NIS-4), at 5-11 to 5-12 (2010), available at http://www.acf.hhs.gov/sites/default/files/opre/nis4_report_congress_full_pdf_jan2010.pdf; Tamar R. Birkhead, *Delinquent by Reason of Poverty*, 38 WASH. U. J.L. & POL'Y, 53, 73 n.97 (2012).

⁶² APA, *supra* note 8, at 7; see also Rachel P. Berger et al., *Abusive Head Trauma During a Time of Increased Unemployment: A Multicenter Analysis*, 128 PEDIATRICS 637 (2011) (finding a significant increase in child maltreatment during a period of recession).

⁶³ YVONNE A. DOERRE & LISA KLEE MIHALEY, CHILD WELFARE LEAGUE OF AM., HOME SWEET HOME: BUILDING COLLABORATIONS TO KEEP FAMILIES TOGETHER xii (1996), see also MARY ANN JONES, PARENTAL LACK OF SUPERVISION: NATURE AND CONSEQUENCE OF A MAJOR CHILD NEGLECT PROBLEM 18-19 (1987) (finding that in approximately half of the "lack of supervision" neglect cases in New York City, parents primarily needed child care for the return of their children); Richard Wexler, *Take the Child and Run: Tales from the Age of ASFA*, 36 NEW ENG. L. REV. 129, 131 (2001) (finding that, in New York and Illinois, "families are repeatedly kept apart solely because they lack decent housing").

⁶⁴ See Bruce A. Boyer & Amy E. Halbrook, *Advocating for Children in Care in a Climate of Economic Recession: The Relationship Between Poverty and Child Maltreatment*, 6 Nw. J.L. & Soc. POL'Y 300, 301-03 (2011) (outlining different possible explanations for this correlation).

⁶⁵ There appears to be no comprehensive national study of the reasons underlying children's placement in foster care or findings of neglect against parents. Although there are no national studies, numerous local studies find that children are removed to foster care for minor, often unnecessary, reasons. See, e.g., *An Examination of the Child and Family Services Agency's Performance When It Removes Children from and*

where there is little or no risk to them: one recent study of the Washington D.C. system found that 75% of children removed did not meet the necessary standard of risk and yet many of them stayed in foster care for weeks or months.⁶⁶ Children are also routinely placed in foster care in part for “dirty houses” and parental marijuana use.⁶⁷ For instance, New York City’s child welfare agency often investigates parents, and sometimes removes their children, where parents possess amounts of marijuana so small they do not merit a misdemeanor criminal charge. They do so despite the lack of showing of any risk or harm to the children.⁶⁸ Such slightly non-normative behaviors can and do result in terminations of parental rights.⁶⁹

The focus on parental conduct also allows for the importation of subjective values into the neglect determination, with some courts ex-

Quickly Returns Them to Their Families, D.C. CITIZEN REVIEW PANEL 5–6 (Sept. 2011) [hereinafter D.C. CITIZEN REVIEW PANEL], http://www.dc-crp.org/Citizen_Review_Panel_CFSQ_Quick_Exits_Study.pdf. In fact, children may be removed for grounds completely unrelated to child care, such as where “an anxious parent loses her temper with a rude child protection investigator.” See Helen Epstein, *New York: The Besieged Children*, N.Y. REV. BOOKS, July 12, 2012, at 51.

⁶⁶ See D.C. CITIZEN REVIEW PANEL, *supra* note 65, at 5, 12, 22. In many of the cases, children were placed in foster care because their parents needed “very short-term” child or respite care. *Id.* at 6; see also Diane L. Redleaf, *Protecting Mothers Against Gender-Plus Bias: Part 1*, AM. BAR ASS’N (Oct. 25, 2011), <http://apps.americanbar.org/litigation/committees/childrights/content/articles/fall2011-protecting-mothers-gender-plus-bias.html> (reporting that 38% of allegations against parents represented by the Chicago-based Family Defense Center claim a future risk of harm rather than any specific actual harm).

⁶⁷ See, e.g., *In re L.P.*, No. 79A02-0912-JV-1215, 2010 WL 3181899 (Ind. Ct. App. Aug. 12, 2010) (upholding a termination of parental rights for a “filthy” house and marijuana use despite mother’s successful completion of court-ordered substance abuse rehabilitation and regular visits with her children); *In re S.F.*, No. 02A03-0909-JV-404, 2010 WL 246083 (Ind. Ct. App. Jan. 22, 2010) (upholding a termination of parental rights for a very dirty house and marijuana use); *In re Keoni Daquan A.*, 937 N.Y.S.2d 160, *1 (N.Y. App. Div. 2012) (applying statute making regular marijuana use “prima facie evidence of neglect”); *In re S.R.*, No. 2-07-454-CV, 2008 Tex. App. LEXIS 4146, at *2 (June 5, 2008) (upholding a termination of parental rights where the home had trash on the counter, roaches and malfunctioning plumbing); see also S.D. CODIFIED LAWS § 26-8A-2(9) (Supp. 2012) (defining neglect to include a child “subject to prenatal exposure to abusive use of alcohol, marijuana, or any controlled drug or substance”). For an outline of medical findings showing a lack of harm to children from pregnant women’s marijuana and other drug use, see Susan Okie, *The Epidemic That Wasn’t*, N.Y. TIMES, Jan. 27, 2009, at D1.

⁶⁸ E.g., Mosi Secret, *No Cause for Marijuana Case, but Enough for Child Neglect*, N.Y. TIMES, Aug. 18, 2011, at A1. For a detailed discussion of the failure of parental marijuana use, in itself, to pose a risk of harm to children, see *In re Smith Jones Children*, No. NN-33551/10, slip op. at *12 (NY Fam. Ct. Jan. 26, 2012).

⁶⁹ See, e.g., *In re Blackmon*, No. 284391, 2008 WL 4604084, at *1 (Mich. Ct. App. Oct. 7, 2008) (affirming a termination of mother’s parental rights where “the barrier to reunification was [solely her] marijuana use”); *In re Lisa W.*, 606 N.W.2d 804, 806 (Neb. 2000) (affirming a termination of parental rights based primarily upon a continuously “unkempt household” and the mother’s failure to adequately budget).

pressly stating that they focus on parental conduct independent of harm to children.⁷⁰ For instance, one family court judge has routinely advised immigrant women to learn English or risk having their parental rights terminated: “If the mother is able to learn English, she will . . . show her [daughter] that she loves her and is willing to do anything necessary to connect with her.”⁷¹ He thereby turned his personal belief about appropriate parenting into the legal definition of neglect, despite any psychological or other data that speaking a language other than English at home is harmful.

Under this framework, child maltreatment is defined as behavior by non-normative families. This same behavior when engaged in by normative families is often not punished. As noted above, many parents in the private family law realm demonstrate many of the same flaws, such as mental illness, domestic violence and substance abuse, yet are almost always able to maintain custody or visitation rights.⁷² Once a parent is involved in the child welfare system, however, her parenting behavior is scrutinized and even legal behaviors, such as smoking or ordering too much take-out food, are frowned upon.⁷³

This increased policing of even minor parenting imperfections is homogenizing, failing to recognize the diversity of parenting styles, a recognition which was one of the original rationales for parental rights.⁷⁴ And it is overwhelmingly cultural and racial minorities whose parenting styles and practices are deemed to be problematic.⁷⁵ For instance, shared parenting among a circle of female relatives is a common practice in many African-American communities, yet is sometimes deemed to be maltreatment.⁷⁶ Similarly, Native Americans live in large extended family groups in one dwelling, a tradition quite often now termed “neglect.”⁷⁷

⁷⁰ See, e.g., *In re Cheatwood*, 697 P.2d 1232, 1234 (Idaho Ct. App. 1985) (“[N]othing in the statutory definition of neglect suggests that a child must suffer demonstrable harm before the parent-child relationship can be terminated.”).

⁷¹ Michelle Kaminsky, *Can Parental Rights Be Terminated for Not Speaking English?*, LEGALZOOM, <http://www.legalzoom.com/marriage-divorce-family-law/family-law-basics/can-parental-rights-be-terminated>.

⁷² See *supra* Part I.A; see also Reed, *supra* note 41, at 133 (pointing out that lower-income parents become involved with the child welfare system because of alcohol abuse but middle and upper income people usually do not because the “alcohol habits of middle class families are rarely investigated by the State”).

⁷³ See Chris Gottlieb, *Reflections on Judging Mothering*, 39 U. BALT. L. REV. 371, 371, 386 (2010); Fraidin, *supra* note 43, at 10.

⁷⁴ See *supra* note 29 (discussing the *Meyer* line of cases).

⁷⁵ See Elaine M. Chiu, *The Culture Differential in Parental Autonomy*, 41 U.C. DAVIS L. REV. 1773, 1793–97 (2007).

⁷⁶ DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* 59 (2002).

⁷⁷ Laura Sullivan & Amy Walters, *Incentives and Cultural Bias Fuel Foster System*, NPR (Oct. 25, 2011), <http://www.npr.org/2011/10/25/141662357/incentives-and-cultural-bias-fuel-foster-system> (outlining the removal of Native American children in South Dakota, often without any showing of risk or harm and their placement in

The state, which is permitted to intervene in families only in situations of extreme harm, now routinely enforces a panoply of parenting behaviors that are culture- and class-specific, including some that are not even proven harmful to children.⁷⁸

Given this misguided approach, it is not surprising that ASFA has been largely ineffective at reducing child maltreatment and has in fact brought some significant harms. Any involvement with the child welfare system, even an investigation that results in no finding, brings stigma and considerable intrusion into families.⁷⁹ Moreover, child welfare agencies disfavor preventive services, and their focus on post hoc remedies to punish parents means that child welfare investigation results in no assistance to families.⁸⁰ Essentially, state intervention “represents a missed opportunity to improve outcomes for children at high risk for future maltreatment, medical problems, and behavioral problems.”⁸¹ The drive towards termination and adoption has also led states to neglect family reunification. The most comprehensive study of ASFA’s effects to date reports both that the legislation did not improve the likelihood or speed of reunification, and that states show “few innovations” in regard to reunification than to guardianship and adoption.⁸²

Although adoptions have increased and average lengths of stay in foster care have decreased under ASFA, far more children age out of fos-

white foster homes despite empty Native American foster homes, a practice reminiscent of the boarding schools to “re-educate” Native Americans in the 1950s and 1960s).

⁷⁸ Evolutionary psychologist Steven Pinker recently described the dramatic decrease in violence against children in the last 20 years, and argues persuasively that “the effort to protect children against violence has begun to overshoot its target and is veering” too far, pathologizing an array of previously acceptable parenting behaviors. STEVEN PINKER, *THE BETTER ANGELS OF OUR NATURE: WHY VIOLENCE HAS DECLINED* 439–43 (2011).

⁷⁹ A case wherein a child was reported for a rash which turned out to be eczema which her parents were treating provides a vivid recent example of this. The child welfare agency stated that it was obligated to investigate the family for 30 days anytime a report was called in, even when the family provided proof of the child’s skin condition. Melissa Russo, *Poll Worker Sees Child with Rash, Reports Family to ACS*, NBC NEW YORK (Apr. 27, 2012), <http://www.nbcnewyork.com/news/local/ACS-Call-Eczema-Board-of-Elections-Voting-Booth-Child-Welfare-149121865.html>. For an outline of some of the harms from a child welfare investigation, see Cynthia Godsoe, *Just Intervention: Differential Response in Child Protection*, 21 J. L. & POL’Y 73 (2012).

⁸⁰ See Kristine A. Campbell et al., *Household, Family, and Child Risk Factors After an Investigation for Suspected Child Maltreatment: A Missed Opportunity for Prevention*, 164 ARCHIVES PEDIATRICS & ADOLESCENT MED. 943, 947 (2010) (finding that CPS investigations with no finding of neglect resulted in families who were the same or worse off after the investigation on every indication of risk, such as social support, family function, poverty, and maternal depression).

⁸¹ *Id.* at 948.

⁸² Olivia Golden & Jennifer Macomber, *The Adoption and Safe Families Act*, in CTR. FOR THE STUDY OF SOC. POLICY & URBAN INST., *INTENTIONS AND RESULTS: A LOOK BACK AT THE ADOPTION AND SAFE FAMILIES ACT* 8, 32 (2009), http://www.urban.org/UploadedPDF/1001351_safe_families_act.pdf.

ter care alone each year than are adopted.⁸³ Many children also still spend significant amounts of time in foster care: as of 2011, the average length of stay in foster care was 23.9 months.⁸⁴ Foster care is not a beneficial experience for most children. In addition to the obvious emotional impact of moving homes, and often neighborhoods and schools as well, children are sometimes harmed in foster care, including being abused by adults or other children in the home.⁸⁵ Significantly, all studies on the subject agree that children in foster care have worse outcomes on every scale—education, employment, criminal justice involvement, etc.—than similarly situated children left home.⁸⁶ I do not mean to minimize the impact of child maltreatment, which is substantial.⁸⁷ Rather, I am pointing out that the data show that the vast majority of children who enter foster care because of neglect would fare better if left in their parents' care, especially with appropriate supports.

b. Devaluation of the Ties Between Children and Their Parents

The idea of bad parenthood underlying the public family law system has also resulted in a devaluation of the parent–child relationship. Because it turns on its head the legal system's assumption that parents love their children, ASFA has channeled hundreds of thousands of parents *out* of parenthood altogether: these parents are bad so children would most likely benefit from the severance of all ties and membership in a new and "better" family.⁸⁸ ASFA's legislative history reflects this narrow definition of permanency: "Children need to know that they have permanency, which means successful, healthy reunification with their birth families or *permanency in an adoptive home*."⁸⁹ I argue that permanency under ASFA has been too narrowly framed to mean only adoption rather than other stable custodial situations or ongoing connections to biological families.

⁸³ *Id.* at 25, 43.

⁸⁴ AFCARS 2011, *supra* note 2, at 2.

⁸⁵ See, e.g., PETER J. PECORA ET AL., CASEY FAMILY PROGRAMS, IMPROVING FAMILY FOSTER CARE: FINDINGS FROM THE NORTHWEST FOSTER CARE ALUMNI STUDY 28, 30 (2005), available at http://www.casey.org/Resources/Publications/pdf/ImprovingFamilyFosterCare_FR.pdf (finding that one third of former foster children questioned reported being abused by a foster parent or another adult in the foster home); see also D.C. CITIZEN REVIEW PANEL, *supra* note 65, at 12 (describing even very brief placement in foster care as a "severe, possibly life-changing event").

⁸⁶ See Joseph J. Doyle, Jr., *Child Protection and Child Outcomes: Measuring the Effect of Foster Care*, 97 AM. ECON. REV. 1583, 1607 (2007); Catherine R. Lawrence et. al., *The Impact of Foster Care on Development*, 18 DEV. & PSYCHOPATHOLOGY 57, 68–72 (2006).

⁸⁷ See, e.g., APA, *supra* note 8, at 8–9 (outlining some of the harms of child maltreatment).

⁸⁸ Dorothy Roberts has argued persuasively that this story also incorporates the historical devaluation of the parent–child relationship in African American families, who are disproportionately represented in the child welfare system. See ROBERTS, *supra* note 76, at 61–62.

⁸⁹ 143 CONG. REC. 26,402 (1997) (statement of Sen. DeWine) (emphasis added). The state was to "find" healthy families for children, rather than fix the existing ones. 143 CONG. REC. 25,438–39 (1997) (Statement of Sen. Rockefeller).

Reflecting this limited view of permanency, parental rights are rarely parsed out in the child welfare context. Workers making the decision whether to remove a child often ignore strong parent-child ties.⁹⁰ Once children are removed from their parents, visitation is usually limited and under conditions not conducive to effective family bonding.⁹¹ Visitation is used to judge parents' behavior; for instance missed visits, often a result of inconvenient timing or transportation problems, are instead seen as a demonstration of the absence of parental love.⁹² As one state warned parents: "repeated failure to visit according to the visiting plan shall be considered a demonstration of a lack of parental concern for the child and may result in the Department seeking a termination of parental rights."⁹³ States admit they will use denial of visitation as a way to punish the parent for seeming noncompliant on other issues, such as mental health or substance abuse treatment.⁹⁴

This dynamic can, and under ASFA often does, culminate in the termination of a parent's rights, which is almost always an absolute end to any legal contact with her child. Accordingly, contracts for post-adoption contact are not enforceable in most states.⁹⁵ Even where tremendous safeguards are built in to ensure that such contacts are not detrimental to children's interests, courts are reluctant to allow them because of the very remote chance that they may impede adoption.⁹⁶ This extremely narrow vision of permanency and parenthood posits a zero-sum dichotomy between old and new parents.

Yet this framework is contradicted by families' real experiences. Numerous studies detail the strong ties most children in foster care feel for their birth parents, even if their parents do not have custody of them or

⁹⁰ See CTR FOR THE STUDY OF SOC. POL'Y, LINN CNTY., IOWA, INSTITUTIONAL ANALYSIS REPORT 11 (2011) [hereinafter IOWA REPORT], available at <http://www.cssp.org/publications/child-welfare/institutional-analysis/Linn-County-Iowa-Institutional-Analysis-Report-August-2011.pdf> (noting that "[m]ost striking was that the trauma most children experience when separated from their parents or caregivers was not accounted for in decision making").

⁹¹ PEG HESS, VISITING BETWEEN CHILDREN IN CARE AND THEIR FAMILIES: A LOOK AT CURRENT POLICY 7, 17-18 (2003), available at http://www.hunter.cuny.edu/socwork/nrcfcpp/downloads/visiting_report-10-29-03.pdf (making "findings . . . of great concern" that most states do not specify the frequency, duration or conditions of visitation or recommend only sporadic visitation).

⁹² *Id.* at 8-9.

⁹³ *Id.* at 9 (quoting ILL. ADMIN. CODE. tit. 89, § 301.210(a)). Parents may also not be consulted about important medical or educational decisions about their children, despite their rights to do so and a mandate for reunification. Margaret Ryznar & Chai Park, *The Proper Guardians of Foster Children's Educational Interests*, 42 LOY. U. CHI. L.J. 147, 162-64 & n.76(2010).

⁹⁴ HESS, *supra* note 91 at 8-11; see Jennifer K. Smith, *Putting Children Last: How Washington Has Failed to Protect the Dependent Child's Best Interest in Visitation*, 32 SEATTLE U. L. REV. 769, 770, 805 (2009).

⁹⁵ See Annette Ruth Appell, *The Myth of Separation*, 6 NW. J.L. & SOC. POL'Y 291, 296-97 (2011).

⁹⁶ See, e.g., *In re Kristin Y.*, 712 S.E.2d 55, 68 (W. Va. 2011).

they cannot be reunified.⁹⁷ Children's attachments to even absent or very flawed parents are deep, as parents play a significant role in the development of their identity and self-esteem.⁹⁸ Many parents can still contribute to a child's life through visits and other contacts, and children benefit from relationships with multiple loving adults.⁹⁹ Beyond their birth parents, children also want to, and often do, stay connected to their extended families, neighborhoods and communities, realities the current child welfare public policy story does not account for.

Even adopted children often want to retain ties to their biological parents.¹⁰⁰ Most children who are adopted when they are old enough to remember their birth parents do not see one mother or father as "replacing" the other.¹⁰¹ Children who are not adopted also retain strong ties to their birth parents, despite a termination.¹⁰² In fact, many of them age out of foster care to voluntarily return to their birth parents, despite the lack of a legal relationship between them.¹⁰³

As with parental conduct, the different treatment of children's and parents' ties in the private and public family law realms is unwarranted. The situation and needs of children in the divorce and foster care context are not so different; as Marsha Garrison has pointed out: "In both contexts, the child's relationship with a noncustodial parent is main-

⁹⁷ See, e.g., Garrison, *supra* note 22, at 380–81 ("Decades of research have . . . established that a child's ties to his parents do not lose their importance simply as a result of separation or loss of day-to-day contact.").

⁹⁸ This is true even for children who have never met their biological parents, and largely explains the desire of many adopted children to search for their biological parents. See Appell, *supra* note 95, at 295–96.

⁹⁹ See Matthew B. Johnson, *Examining Risks to Children in the Context of Parental Rights Termination Proceedings*, 22 N.Y.U. REV. L. & SOC. CHANGE 397, 407–11, 414 (1996); see also Shelley A. Riggs, *Response to Troxel v. Granville: Implications of Attachment Theory for Judicial Decisions Regarding Custody and Third-Party Visitation*, 41 FAM. CT. REV. 39, 43–44 (2003) (discussing psychological findings from cross-cultural studies showing that children can develop multiple strong attachments concurrently).

¹⁰⁰ See Johnson, *supra* note 99, at 414.

¹⁰¹ See *id.* at 408–09.

¹⁰² See, e.g., MADELYN FREUNDLICH, CHAFEE PLUS TEN: A VISION FOR THE NEXT DECADE 18 (2010), available at <http://www.jimcaseyouth.org/filedownload/331>. The psychological research demonstrating this is amply supported by the experience of children's advocates and attorneys, as well as others working with foster youth: these children know and care about their parents and want to maintain some kind of contact with them, despite the abuse or neglect they have suffered. See, e.g., Appell, *supra* note 95, at 295. One client expressed it to me thus: "I don't care what they say. She'll always be my mom. A piece of paper doesn't change that." See Cynthia Godsoe, *Restoring Families*, NAT'L L.J., May 31, 2010, at 35.

¹⁰³ CASEY FAMILY PROGRAMS, IMPROVING OUTCOMES FOR OLDER YOUTH IN FOSTER CARE 1 (2008), available at http://www.casey.org/resources/publications/pdf/WhitePaper_ImprovingOutcomesOlderYouth_FR.pdf; see also GINA MIRANDA SAMUELS, CHAPIN HALL CTR. FOR CHILDREN AT THE UNIV. OF CHI., A REASON, A SEASON, OR A LIFETIME: RELATIONAL PERMANENCE AMONG YOUNG ADULTS WITH FOSTER CARE BACKGROUNDS 8 (2008), available at http://www.chapinhall.org/sites/default/files/old_reports/415.pdf.

tained through visitation and sporadic contact rather than a day-to-day relationship.”¹⁰⁴ Failing to recognize the significance of these ties, the ASFA framework harshly cuts off the parent–child relationship to enable children to gain a “new” family. This ignores the realities of adoption—more terminations do not add up to more homes for children.¹⁰⁵

Instead, the strict timelines for terminations coupled with the dynamics of adoption demand have led in the last decade to the creation of a huge number of “legal orphans,” or children who have no legal ties to any adult and who will not be adopted.¹⁰⁶ Thus, while the number of children in foster care has gone down in the last decade, the number of legal orphans, or children “aging out” of foster care, has significantly increased.¹⁰⁷ Large numbers of legal orphans continue to be created by the ASFA system.¹⁰⁸ There were 104,236 children waiting to be adopted in 2011.¹⁰⁹ (And this number is an underestimate as it excludes teenagers over 16 years old with a goal of independent living or emancipation, who are still “legal orphans.”) Most of these children will not be adopted, and

¹⁰⁴ Garrison, *supra* note 22, at 379.

¹⁰⁵ This truth reveals the flawed basis for Senator Jesse Helms’s insistence at the time of ASFA’s enactment that, if more children were offered for adoption, the adoptive parents would be there: “There is no shortage of [adoptive] parents.” 143 CONG. REC. 25,439 (1997) (statement of Sen. Helms).

¹⁰⁶ Professor Martin Guggenheim identified the growing legal orphan problem even before the passage of ASFA worsened it. See Martin Guggenheim, *The Effects of Recent Trends to Accelerate the Termination of Parental Rights of Children in Foster Care—An Empirical Analysis in Two States*, 29 FAM. L.Q. 121 (1995).

¹⁰⁷ PEW CHARITABLE TRUSTS, TIME FOR REFORM: AGING OUT AND ON THEIR OWN (2007), available at http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/News/Press_Releases/Foster_care_reform/Aging_Out_May2007.pdf (finding that the number of youth “aging out” of the system grew by 41% between 1998 and 2007, totaling 165,000 youth between 1998 and 2005); see also Barbara White Stack, *Law to Increase Adoptions Results in More Orphans*, SEATTLEPI (Jan. 2, 2005), <http://www.seattlepi.com/national/article/Law-to-increase-adoptions-results-in-more-orphans-1163211.php> (citing an estimate that 5,970 legal orphans were created in 1997 and four times as many, 24,219, just two years later, post-ASFA, in 1999).

¹⁰⁸ It is hard to obtain precise data on this issue, but experts agree that large numbers of youth continue to age out of foster care. See PEW CHARITABLE TRUSTS, *supra* note 107; see also ORPHAN SOCIETY OF AMERICA, ASSESSMENT ON THE STATE OF PARENTLESS CHILDREN & YOUTH IN THE U.S. 4 (2007), available at http://www.theorphansociety.org/pdf/OSAReport_Final%20High%20Res.pdf (estimating that 35% of the children in the child welfare system “are orphans who are eligible for or are awaiting adoption”); Mark Courtney, *Youth Aging Out of Foster Care*, NETWORK ON TRANSITIONS TO ADULTHOOD POL’Y BRIEF, Apr. 2005, at 1, available at <http://transitions.s410.sureserver.com/wp-content/uploads/2011/08/courtney-foster-care.pdf> (estimating that each year, 20,000 youth age out of foster care in the United States).

¹⁰⁹ AFCARS 2011, *supra* note 2, at 4. More than one quarter of these children are between the ages of 13 and 17. *Id.* Moreover, analysis of AFCARS data suggests that, once children are between 8 and 9 years old, they are more likely to continue to wait for a family than be adopted. Amy Taylor, *Older Youth in Foster Care: Challenges and Opportunities*, NAT’L CONF. OF ST. LEGISLATURES (Dec. 2010), <http://www.ncsl.org/issues-research/human-services/child-welfare-legislative-policy-newsletter-decem.aspx>.

many will spend significant amounts of time in foster care.¹¹⁰ Only 12% are in preadoptive homes.¹¹¹ They have been in foster care for at least three years continuously and were freed for adoption on average 23.6 months ago.¹¹² Older children constitute a disproportionately large number of those with an unmet goal of adoption and the gap between the number waiting for adoption and the number adopted widens as children age.¹¹³

Most of these older children will exit foster care as legal orphans, aging out to “independent living.” About 30,000 children a year exit the system with no legal ties to any family—about five times as many youth as are adopted.¹¹⁴ In several cases, the child’s desire for a family connection has led to perverse legal outcomes such as parents adopting or becoming guardians for their own biological children after a termination of parental rights.¹¹⁵ In the usual case where a child is a legal orphan with no recognized ties to any family, there are numerous harms, including serious

¹¹⁰ There are numerous reasons these children will not be adopted including the lack of adoptive parents for certain kinds of children, such as older children, children with siblings, or those with special needs, or the refusal of caregivers to adopt, often because of a desire not to displace or create conflict with the biological parent and confusion about the need for adoption where the kinship caregiver is already related and committed to the child. See Meryl Schwartz, *Reinventing Guardianship: Subsidized Guardianship, Foster Care, and Child Welfare*, 22 N.Y.U. REV. L. & SOC. CHANGE 441, 454–55 (1996). Older children themselves often decline to be adopted, perhaps because of ties to birth parents which are usually cut off by adoption. In virtually every state, children of a certain age have the right to consent to or refuse adoption. See, e.g., N.J. STAT. ANN. § 9:3-49 (West 2002) (allowing children aged 10 and up to consent or refuse an adoption).

¹¹¹ AFCARS 2011, *supra* note 2 at 4. The percentage is even lower when considering all children in foster care with a goal of adoption: as of 2011, only 4% of children in foster care were in a pre-adoptive home although 25% had a goal of adoption. *Id.* at 1.

¹¹² *Id.* at 4–5.

¹¹³ *Id.* at 4; see also Mary Eschelbach Hansen & Josh Gupta-Kagan, *Raising the Cut-Off: The Empirical Case for Extending Adoption and Guardianship Subsidies from Age 18 to 21*, 13 U.C. DAVIS J. JUV. L. & POL’Y 1, 5–6 (2009) (analyzing data from AFCARS 2002–06). Youth aged 12 and older constitute about half of the national foster care population at any given time. AFCARS 2011, *supra* note 2, at 1 (showing 39% of children in foster care in 2011 were aged 12 years or older); see also Sonya J. Leathers et al., *Predicting Family Reunification, Adoption, and Subsidized Guardianship Among Adolescents in Foster Care*, 80 AM. J. ORTHOPSYCHIATRY 422, 422 (2010) (reporting that in 2008, 43% of children in foster care were 12 or older and 14% were 17 or older and noting that the chances for reunification diminish the longer a child stays in foster care).

¹¹⁴ AFCARS 2011, *supra* note 2, at 3, 5 (showing 26,286 exiting due to emancipation and 5,152 teens adopted); *The AFCARS Report: Preliminary FY 2010 Estimates as of June 2011*, CHILDREN’S BUREAU 2, 7 (June 30, 2011) (showing 27,854 exiting due to emancipation and 5,452 teens adopted); *The AFCARS Report: Preliminary FY 2009 Estimates as of July 2010*, CHILDREN’S BUREAU (July 31, 2010) (showing 29,471 exiting due to emancipation and 5,746 teens adopted).

¹¹⁵ See, e.g., *In re Theresa O.*, 809 N.Y.S.2d 439 (N.Y. Fam. Ct. 2006); *In re Cody B.*, 153 Cal. App. 4th 1004 (Cal. Ct. App. 2007).

emotional harm.¹¹⁶ As one foster youth put it: “I belonged to nobody.”¹¹⁷ Significantly, children who age out of foster care without a stable family connection are at greatly increased risk for poor outcomes as adults. For instance, they are much more likely to have poor educational outcomes including dropping out of high school, becoming pregnant before the age of 21, and being arrested, incarcerated, homeless, and unemployed.¹¹⁸

II. THE CHILD WELFARE SYSTEM’S RESISTANCE TO CHANGE

Despite the widely acknowledged failures of the child welfare system and empirical data demonstrating social risk factors for child maltreatment, the public policy story of the “bad parent” persists. Cognitive science, specifically behavioral realist insights into the influence of heuristics and implicit biases on our decision-making, can help to explain this puzzling phenomenon. Although implicit bias has been used to examine persistent inequities in other systems, its role in the family law realm has been largely unexplored. Here, I do not seek to argue that decision-makers in the child welfare realm are explicitly biased, but rather only to draw some initial suggestions about how, once we view a problem one way and a story of blame is told, the legal framework can perpetuate this flawed narrative and make it difficult to view the problem objectively or afresh.¹¹⁹

A. *Implicit Social Cognition Theory*

Recent insights into implicit social cognition round out the law’s vision of human behavior, previously depicted as strictly rational by economists and others.¹²⁰ Implicit social cognition examines “how we make

¹¹⁶ See FREUNDLICH, *supra* note 102, at 17. Significant financial harms also result from legal orphanhood status. See Richard L. Brown, *Disinheriting the “Legal Orphan”*: *Inheritance Rights of Children After Termination of Parental Rights*, 70 Mo. L. Rev. 125 (2005).

¹¹⁷ GLORIA HOCHMAN ET AL., FOSTER CARE: VOICES FROM THE INSIDE 1 (2004), available at http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Foster_care_reform/foster_care_voices_021804.pdf.

¹¹⁸ See CASEY FAMILY PROGRAMS, *supra* note 103, at 3–4. These poor outcomes impose large costs on society. IRA CUTLER, CUTLER CONSULTING, COST AVOIDANCE: BOLSTERING THE ECONOMIC CASE FOR INVESTING IN YOUTH AGING OUT OF FOSTER CARE I (2009), available at <http://www.jimcaseyyouth.org/cost-avoidance-bolstering-economic-case-investing-youth-aging-out-foster-care-0> (estimating the cost of the outcome differences of the aging out population to be nearly \$5.7 billion annually).

¹¹⁹ There appear to be no empirical studies comprehensively addressing the potential role of cognitive biases in public family law. However, more anecdotal localized studies often cite bias among caseworkers and other child welfare actors. See, e.g., IOWA REPORT, *supra* note 90, at 13.

¹²⁰ See, e.g., Gary Blasi & John T. Jost, *System Justification Theory and Research: Implications for Law, Legal Advocacy, and Social Justice*, 94 CAL. L. REV. 1119 (2006); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005).

sense of other people,” including our perception of people and their behavior.¹²¹ It acknowledges that humans sometimes act irrationally and that implicit knowledge or bias can impact a wide range of human behavior.¹²² Individuals, as well as institutional actors, may be subject to cognitive biases.¹²³ Scholars in the social sciences and law have used theories of implicit social cognition to explain individual decision-making in, for instance, employment discrimination and criminal cases, as well as the systemic persistence of inequitable social structures and dynamics.¹²⁴ As psychologists Daniel Kahneman and Amos Tversky revealed in their groundbreaking studies of decision-making, the lens through which a question or problem is approached can have a profound effect on the chosen solution.¹²⁵

1. *Stock Stories and Framing*

Stereotypes both underlie and are perpetuated by the legal system. Representativeness bias causes us to assign individuals to a particular group, and then unconsciously and automatically assign the characteristics of the group to the individual, despite the lack of any confirming evidence.¹²⁶ Stereotypes are cognitively useful as shortcuts; we approach is-

¹²¹ Michelle van Ryn & Steven S. Fu, *Paved with Good Intentions: Do Public Health and Human Service Providers Contribute to Racial/Ethnic Disparities in Health?*, 93 AM. J. PUB. HEALTH 248 (2003) (applying social cognition theory to study health care provider decision-making and systemic inequities). I recognize the critiques of social cognition theory’s application to law, in that it may sweep with an overly broad brush, that not all people are equally irrational, and that cognition depends upon context. See, e.g., Gregory Mitchell, *Why Law and Economics’ Perfect Rationality Should Not Be Traded for Behavioral Law and Economics’ Equal Incompetence*, 91 GEO. L.J. 67 (2002). Nonetheless, I think that this literature is still helpful in understanding the persistence of an irrational child welfare system—irrational because of its proven ineffectiveness and its cost. Moreover, an awareness of potential biases can give us a more well-rounded view of the various ideals underlying and constraints limiting public policy choices as to families.

¹²² See Linda L. Berger, *How Embedded Knowledge Structures Affect Judicial Decision Making: A Rhetorical Analysis of Metaphor, Narrative, and Imagination in Child Custody Disputes*, 18 S. CAL. INTERDISC. L.J. 259, 263 (2009); see also IAN AYRES, *PERVASIVE PREJUDICE?: UNCONVENTIONAL EVIDENCE OF RACE AND GENDER DISCRIMINATION* (2001) (noting how implicit bias against members of certain races can impact a wide range of transactions from car sales to organ transplants).

¹²³ See Jeffrey J. Rachlinski, *The “New” Law and Psychology: A Reply to Critics, Skeptics, and Cautious Supporters*, 85 CORNELL L. REV. 739, 744 (2000).

¹²⁴ See, e.g., Burke, *supra* note 19 (applying social cognition theory to prosecutorial decision-making); see also Blasi & Jost, *supra* note 120 (discussing the perpetuation of systemic discrimination in employment and other contexts). My focus here is not on the intent of individual actors, as in discrimination cases, but rather on the larger public policy narrative underlying the child welfare system.

¹²⁵ See generally DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* (2011); Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, 5 COGNITIVE PSYCHOL. 207 (1973).

¹²⁶ van Ryn & Fu, *supra* note 121, at 251.

sues using these “stock stories” and frames of reference.¹²⁷ Frames, or “schemata of interpretation,” allow us to interpret new experiences by relating them to categories or “scripts” from prior experience.¹²⁸ They apply not just to our perceptions of people but also to our understanding of all the circumstances of a particular situation: “Facts ‘speak for themselves’ only against the background of preexisting understandings of social reality that invest those facts with meaning.”¹²⁹ Accordingly, how an issue and its participants are framed will largely determine how people decide to respond to the issue: “Every frame defines the issue, explains who is responsible, and suggests possible solutions.”¹³⁰ Frames can distort the reality of many situations, thereby perpetuating inequities and supporting ineffective policies.¹³¹ For instance, a house fire in which small children die can be told as a story about poverty, negligent landlords, ineffective city oversight, or parental neglect.¹³²

Public policy stories are conveyed via simplistic metaphor and archetypal black-and-white constructs.¹³³ This allows the status quo to seem natural, rather than a socio-legal construct.¹³⁴ Legal scholars such as Jon Hanson have argued that the key policy frame of our era, “choicism,” allows us to attribute disparities to the character and freely selected actions of certain people.¹³⁵ For instance, we blame low-income people for not having risen in the “meritocratic” American society rather than look at the educational and economic advantages accorded to people born into more affluent families. These “victim-blaming” stereotypes help to maintain the social status quo by blaming the individual disadvantaged for their plight.¹³⁶ Simply put, to maintain the illusion of legitimacy in our

¹²⁷ Blasi & Jost, *supra* note 120, at 1150–51; see also ZIVA KUNDA, *SOCIAL COGNITION: MAKING SENSE OF PEOPLE* 309 (1999) (positing that people use stereotypes to compensate for insufficient “cognitive resources”).

¹²⁸ See Blasi & Jost, *supra* note 120, at 1149–51 & n.112; John T. Jost & Mahzarin R. Banaji, *The Role of Stereotyping in System-Justification and the Production of False Consciousness*, 33 *BRIT. J. SOC. PSYCHOL.* 1 (1994).

¹²⁹ Dan M. Kahan et al., *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 *HARV. L. REV.* 837, 883 (2009). These scholars, part of the Cultural Cognition Project, have demonstrated that these understandings vary across societal groups systematically. *Id.* Although a discussion of cultural cognition’s application in the child welfare context is beyond the scope of this Article, these insights are consistent with my argument about the different ways in which legislators and courts view private and public families.

¹³⁰ Blasi & Jost, *supra* note 120, at 1150.

¹³¹ See Jon Hanson & Kathleen Hanson, *The Blame Frame: Justifying (Racial) Injustice in America*, 41 *HARV. C.R.-C.L. L. REV.* 413, 425 (2006).

¹³² See Gary Blasi, *Framing Access to Justice: Beyond Perceived Justice for Individuals*, 42 *LOY. L.A. L. REV.* 913, 935–36 (2009).

¹³³ Berger, *supra* note 122 at 268 (noting that “story-myths” often prioritize clarity over complexity).

¹³⁴ Blasi & Jost, *supra* note 120, at 1123.

¹³⁵ Hanson & Hanson, *supra* note 131, at 418–19.

¹³⁶ Blasi & Jost, *supra* note 120, at 1134–35.

legal and social systems, we “attribut[e] bad outcomes to bad people, not to a bad world.”¹³⁷

2. *Confirmation Bias and the Availability Heuristic*

A desire for certainty and closure also leads people to prefer simple explanations over more nuanced ones, and to seek out or prioritize information that confirms their initial beliefs or theories.¹³⁸ Research demonstrates that people process information selectively; they instinctively seek and overvalue information which confirms their initial belief or theory, and discount evidence tending to challenge those theories.¹³⁹ This confirmation bias and instinctual avoidance of cognitive dissonance act to reinforce unconscious prejudices and perpetuate existing inequities and theories of blame and responsibility. For instance, a person’s judgments about a particular issue, such as child maltreatment, are likely to be based on heuristics or “cognitive shortcuts” based on her prior unconscious beliefs about parents who are accused of child maltreatment, rather than on evidence about the individual facts of any one case.¹⁴⁰

The tendency to judge situations according to preexisting beliefs is worsened by the “availability heuristic” or the “process of judging frequency by the ease with which instances come to mind.”¹⁴¹ Thus, for instance, once child maltreatment is represented by the media and in policy debates as being about bad parenting, caseworkers and other decision-makers will call upon those representations in making decisions about individual cases. This heuristic, rather than real risk probabilities, drives risk assessments, such as whether or not a parent is likely to harm a child.¹⁴² The fact that we rely on existing interpretations of problems means that it is very difficult to change policy approaches to a particular issue.¹⁴³

These implicit cognitive forces work together to reinforce the status quo and impede social change. Gary Blasi and John Jost have outlined how the desire to believe that the systems comprising our world are fair and legitimate lead people to support these systems, even in the face of contrary evidence.¹⁴⁴ The disadvantaged may even be demonized as

¹³⁷ Adam Benforado & Jon Hanson, *The Great Attributional Divide: How Divergent Views of Human Behavior Are Shaping Legal Policy*, 57 EMORY L.J. 311, 327 (2008); see also Jost & Banaji, *supra* note 128, at 10.

¹³⁸ Benforado & Hanson, *supra* note 137, at 386.

¹³⁹ See Burke, *supra* note 19, at 1593–94.

¹⁴⁰ Berger, *supra* note 122, at 298–99.

¹⁴¹ KAHNEMAN, *supra* note 125, at 129 (internal quotation marks omitted). See generally *id.* ch. 12.

¹⁴² See RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* (2008).

¹⁴³ Cass Sunstein has termed this narrowing of policy options the “availability cascade.” Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683 (1999); see also KAHNEMAN, *supra* note 125, at 140–44.

¹⁴⁴ Blasi & Jost, *supra* note 120, at 1122–23.

“brutes” or “beasts,” allowing those better off to excuse their non-action or passive observation of suffering.¹⁴⁵ For instance, mothers who are suspected of maltreatment are deemed to be “bad” people who have chosen to prioritize their own needs over those of their children. These simplistic “blame frames” allow us to overcome our own discomfort with suffering or inequality by creating an illusion of justice, rather than engaging in the difficult work of addressing the injustice itself.¹⁴⁶

3. *A Recent Case Example*

A recent case from Alabama illustrates how child maltreatment can be viewed through multiple frames.¹⁴⁷ In July 2011, a mother left her two children alone in a public place for several hours. As a result, she faced six criminal child endangerment charges. People saw her as a selfish and irresponsible mother who put her children at risk by leaving them in a public place unsupervised.¹⁴⁸ She was to blame and accordingly merited punishment, and her children would be better off in foster care or with other custodians.

But a deeper look reveals other frames through which to view this case. Perhaps the mother is low-income and has inadequate child care, particularly during the summer months.¹⁴⁹ Perhaps she herself regularly went alone to the public library as a child and concluded that the bookstore was a similarly safe place for children. Leaving their children alone is widespread behavior for many parents, particularly those unable to afford child care. Research indicates that 11% of children aged 6 to 12 years old are in “self-care” both during the summer and during the school year.¹⁵⁰ Parents often do not know what behavior is expected of them. Almost all states do not specify an age at which it is neglectful to leave a child alone or in a sibling’s care.¹⁵¹

According to the mother in this case, the children stayed for a few hours in the reading section of Barnes and Noble and were, by all accounts, well behaved and safe.¹⁵² Nonetheless, a store employee called the police.¹⁵³ Told this way, the story may be seen as one about a parent

¹⁴⁵ Hanson & Hanson, *supra* note 131, at 420–21; *see also* Fraidin, *supra* note 43.

¹⁴⁶ Hanson & Hanson, *supra* note 131, at 417.

¹⁴⁷ *See Charlene Sutherland Left Kids at Barnes & Noble to Run Errands, Faces Prison Time*, HUFFINGTON POST (Sept. 15, 2011, 11:31 AM), http://www.huffingtonpost.com/2011/09/15/charlene-sutherland-barnes-noble_n_962954.html.

¹⁴⁸ For example, *see* the comments to Colleen Curry, *Mom Drops Kids at Barnes and Noble During Errands, Now Faces Prison*, ABC NEWS (Sept. 14, 2011), <http://abcnews.go.com/US/mom-drops-off-kids-barnes-noble-faces-years/story?id=14518963>.

¹⁴⁹ *See id.*

¹⁵⁰ JEFFREY CAPIZZANO ET AL., WHAT HAPPENS WHEN THE SCHOOL YEAR IS OVER? THE USE AND COSTS OF CHILD CARE FOR SCHOOL-AGE CHILDREN DURING THE SUMMER MONTHS 6 (2002), http://www.urban.org/UploadedPDF/310497_OP58.pdf.

¹⁵¹ *See Leaving Your Child Home Alone*, CHILD WELFARE INFO. GATEWAY (2007), <http://www.childwelfare.gov/pubs/factsheets/homealone.cfm>.

¹⁵² Curry, *supra* note 148.

¹⁵³ *Id.*

struggling with a lack of resources and societal support. Or of a caring mother trying to adapt to changing, perhaps impossibly high, parenting standards.¹⁵⁴ No longer is bad parenting the only possible explanation.

B. *Blame Framing in the Child Welfare System*¹⁵⁵

The child welfare system is particularly susceptible to implicit biases because of the pervasive judgment about parenting, the pre-existing marginalization of families in the child welfare system, the complexity of real solutions to child maltreatment, and the simplistic appeal of the adoption story.¹⁵⁶ Accordingly, the public policy story of child maltreatment persists as a matter of parental immorality and wrongdoing.

1. *The Constant Scrutiny of Parenting*

Numerous commentators in both academia and the popular press have noted the pervasiveness of today's judgmental discourse about parenting, particularly mothering.¹⁵⁷ There is abundant public dialogue about how children should be fed, disciplined, educated, and how many women are doing it wrong. As one commentator has written: "The litany of issues on which mothers are judged harshly is seemingly endless, with no infraction too small or too strange to elicit comment."¹⁵⁸ Even Sesame Street is not safe for today's children. A recent release of old episodes contains the following warning to parents: "These early 'Sesame Street'

¹⁵⁴ The comments to one story about this case reveal both how common it is to leave children unsupervised, or younger children in the care of older children, and yet how contested this parenting behavior has become. See Curry, *supra* note 148; see also Emily Bazelon, *My Mother, My Bodyguard*, SLATE (April 18, 2008), http://www.slate.com/articles/life/family/2008/04/my_mother_my_bodyguard.html (discussing the ferocious debates online after *New York Sun* writer Lenore Skenazy wrote about letting her nine-year-old son ride the New York subway by himself).

¹⁵⁵ The name of this section is taken from Hanson & Hanson, *supra* note 131.

¹⁵⁶ Not surprisingly then, the few studies of child protection worker decision-making show that their decisions are inconsistent and often reflect a range of cognitive biases. See Bay Area Soc. Servs. Consortium, *Risk and Safety Assessment in Child Welfare: Instrument Comparisons*, EVIDENCE FOR PRAC., July 2005, at 1, available at http://cssr.berkeley.edu/bassc/public/risk_summ.pdf; ANGELA WHITE & PETER WALSH, *RISK ASSESSMENT IN CHILD WELFARE: AN ISSUES PAPER 4–5* (2006), available at http://www.community.nsw.gov.au/docswr/_assets/main/documents/research_riskassessment.pdf. There is little inter-rater reliability among the decisions of different workers, meaning that the same facts lead different workers to make very different decisions. See Kathleen G. Noonan et al., *Legal Accountability in the Service-Based Welfare State: Lessons from Child Welfare Reform*, 34 LAW & SOC. INQUIRY 523, 558 (2009).

¹⁵⁷ See, e.g., AYELET WALDMAN, *BAD MOTHER: A CHRONICLE OF MATERNAL CRIMES, MINOR CALAMITIES, AND OCCASIONAL MOMENTS OF GRACE* (2009). In fact, the power of metaphors about parents and parenting is so great that George Lakoff, the "father of framing," uses images of the strict father and the nurturing parent to divide people into two camps with different moral and political viewpoints. GEORGE LAKOFF, *MORAL POLITICS* chs. 5–6 (2nd ed. 2002).

¹⁵⁸ Gottlieb, *supra* note 73, at 371.

episodes are intended for grown-ups and may not suit the needs of today's preschool child."¹⁵⁹

This harsh and judgmental discourse permeates the legal systems governing families, bolstered by vague standards such as the "best interests of the child."¹⁶⁰ Similarly, child maltreatment definitions are often based on vague standards of normative parental conduct rather than conduct connected to actual harm or imminent risk to children.¹⁶¹ In this framework, judges and caseworkers are vulnerable to importing their own notions of parenting onto the families they deal with.¹⁶² This wide range of discretion allows bias to play a significant role, driving judgments about parents' unworthiness.¹⁶³ The overly simplified treatment of the complex task of raising children allows for no nuances. For instance, a woman who uses any alcohol or drugs is per se a bad mother.¹⁶⁴

Cognitive biases can influence both individual decision-makers and child welfare agencies as entities.¹⁶⁵ Providers' unconscious biases about certain types of parents may lead them to fail to offer these parents a full range of options. In the health care context, research has demonstrated that doctors are less likely to offer certain cardiac treatments to patients they assumed were going to abuse drugs or have less social support than they believed necessary.¹⁶⁶ Systemic biases are particularly pernicious since institutional change is slow, caseworkers serve as gatekeepers for information, access to resources, and eligibility for programs, and much decision-making happens entirely outside of the court system.¹⁶⁷ Thus,

¹⁵⁹ Virginia Heffernan, *Sweeping the Clouds Away*, N.Y. TIMES, Nov. 18, 2007, § 6 (Magazine), at 34.

¹⁶⁰ Berger, *supra* note 122, at 282.

¹⁶¹ See *supra* Part I.B.2.a.

¹⁶² Berger, *supra* note 122, at 284 ("Like the rest of us, judges draw on embedded knowledge structures, and they tend to turn first to whatever commonsense background theory [is] prevalent in the legal culture of their era" (alteration in original) (quoting Phoebe C. Ellsworth, *Legal Reasoning*, in THE CAMBRIDGE HANDBOOK OF THINKING AND REASONING 685, 686 (Keith J. Holyoak & Robert G. Morrison eds., 2005))).

¹⁶³ IOWA REPORT, *supra* note 90, at 13 (noting that stigma plays a large role in caseworker decision-making).

¹⁶⁴ *Id.* at 3, 10 (noting that the county child welfare system operated on the assumption that "any use of drugs or alcohol" can compromise parenting ability).

¹⁶⁵ *Id.* at 3 (examining the "problematic institutional assumptions, policies, protocols, information gathering and sharing, and decision making processes that organize or drive [worker] action").

¹⁶⁶ See van Ryn & Fu, *supra* note 121, at 251.

¹⁶⁷ See Sally Holland, *The Assessment Relationship: Interactions Between Social Workers and Parents in Child Protection Assessments*, 30 BRIT. J. SOC. WORK 149, 152, 160–61 (2000) (outlining how child protective worker decisions turn most heavily on the CPS office where they work, on their assessments of the mother's personality and on perceptions of her cooperation with the worker); Noonan et al., *supra* note 156, at 555 (2009) (noting that CPS caseworker practice "ha[s] been governed more by worker bias and the local office practice culture than by [state regulations and procedures]" (quoting *Implementation of Alabama's R. C. Consent Decree: Creating a New*

their biases can lead to significant disparities in the deliverance of services to various parents.¹⁶⁸

2. *The Racial and Economic Marginalization of “Bad” Mothers*

In our schemas of interpretation, the farther away something is from the normative ideal, the less it is valued.¹⁶⁹ The vast majority of parents accused of child maltreatment are low-income, and they are disproportionately single women of color.¹⁷⁰ Thus these families are particularly different from the white, two-parent families idealized in our law and culture.¹⁷¹ Their difference is compounded by their lack of political power and often substandard levels of representation in child welfare proceedings.¹⁷² As a result, the child welfare system has not been held to the same levels of clarity or accountability as other government programs.¹⁷³

Moreover, the fact that parents in public family law are far from the normative ideal makes them more susceptible to the theories of poor

Culture of Practice, CHILD WELFARE POL’Y & PRAC. GROUP 6, http://www.childwelfaregroup.org/documents/AL_RC_Implementation.pdf). The high caseloads and wide discretion accorded caseworkers, as well as the lack of any standardized system for assessing risk to children, means that cases will usually turn on a caseworker’s impression of a parent’s compliance and on the caseworker’s willingness to exercise discretion on a parent’s behalf. See, e.g., Jackie Crisp, *I Didn’t Think I Could Recover from My Addiction in 15 Months*, RISE (2009), as reprinted in CTR. FOR THE STUDY OF SOC. POLICY & URBAN INST., INTENTIONS AND RESULTS: A LOOK BACK AT THE ADOPTION AND SAFE FAMILIES ACT 38 (2009), http://www.urban.org/UploadedPDF/1001351_safe_families_act.pdf (quoting a parent whose caseworker “fought for [her]” to be reunified with her children despite her having exceeded the ASFA timelines).

¹⁶⁸ See van Ryn & Fu, *supra* note 121 (pointing to the potential influence of health care providers’ biases on disparities in health care delivery because the providers serve as “gatekeepers”). These disparities can result in widely different access to certain programs for which caseworkers determine eligibility, such as subsidized guardianship. See *infra* Part III.A. In fact, some workers blatantly abuse this discretion, deliberately undermining parents whom they do not like, even to the detriment of the children whom workers are tasked with protecting. For a recent example, see Garrett Therolf, *County Workers Rebuked for Misusing Power in Child Welfare Case*, L.A. TIMES (Jul. 2, 2012), <http://articles.latimes.com/print/2012/jul/02/local/la-me-dcfs-20120702> (outlining how two social workers “maliciously” contacted a family’s landlord and a child’s school, resulting in the family’s eviction and the child’s expulsion, because of “bad blood” between workers and the reformed mother and how they ultimately were rebuked by the court).

¹⁶⁹ See Cynthia Godsoe, *Caught Between Two Systems: How Exceptional Children in Out-of-Home Care Are Denied Equality in Education*, 19 YALE L. & POL’Y REV. 81, 115–17 (2000); see also Berger, *supra* note 122, at 264–65.

¹⁷⁰ See *supra* Part I.B.2.a about the complex correlation between poverty and child maltreatment. The high correlation of poverty with race in America can result in disproportionate representation of families of color in the child welfare system.

¹⁷¹ For an outline of the concept of difference, see the seminal work MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* (1990); see also ROBERTS, *supra* note 76.

¹⁷² Susan Calkins, *Ineffective Assistance of Counsel in Parental-Rights Termination Cases: The Challenge for Appellate Courts*, 6 J. APP. PRAC. & PROCESS 179 (2004).

¹⁷³ Gottlieb, *supra* note 73, at 378.

choices and blame used to justify unfair and discriminatory systems.¹⁷⁴ As noted earlier, the parenting practices deemed to be neglect or abuse are often culturally specific preferences, rather than actual harmful behavior.¹⁷⁵ Studies have also highlighted that workers sometimes are overly judgmental of or intrusive into non-normative families.¹⁷⁶ Ultimately, the marginalization of these families reinforces the story of child maltreatment as one of individual fault and immorality.

3. *The Preference for Simplistic Blaming over Difficult Solutions*

That our child welfare system is broken and severely ineffective is something upon which virtually every expert agrees.¹⁷⁷ The system serves neither children nor their parents, and the extent of its disrepair cannot be overstated. The services most states currently offer to families are woefully inadequate and, in some instances, proven to be ineffective. Parents are often essentially set up for failure because of these inadequate, “cookie-cutter” services.¹⁷⁸

Stock stories about good and bad parents may lead child welfare workers to make assumptions about a parent’s willingness to care for a child that are unwarranted by the facts of the situation. For instance, a caseworker may assume a parent is unwilling to care for a child when the parent asks for housing assistance and expresses concern that a pending eviction would make it difficult to care for the child. They then react by removing children rather than offering housing assistance.¹⁷⁹ Or caseworkers may see the parent’s lack of progress on complex issues such as substance abuse as a choice, rather than an illness or a public health problem, and may try to coerce or “motivate” the parent by, for instance,

¹⁷⁴ See *supra* Part II.B.1.

¹⁷⁵ *Id.*; see also Gaia Bernstein & Zvi Triger, *Over-Parenting*, 44 U.C. DAVIS L. REV. 1221 (2011) (outlining how culturally specific norms are often incorporated into substantive legal standards).

¹⁷⁶ See, e.g., IOWA REPORT, *supra* note 90, at 8 (documenting that child protection workers intervened extensively into some African American families “with no clear reason or rationale,” including denying one mother unsupervised visits with her children for an entire year despite the lack of any safety concerns); see also Dorothy E. Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 UCLA L. REV. 1474, 1486 (2012) (outlining a recent study of the Michigan child welfare system which found that workers stereotyped African-American women as “hostile,’ ‘aggressive,’ ‘angry,’ [and] ‘loud’” and “failed to fairly assess or appreciate these [women’s] unique strengths and weaknesses related to the ability to care for children”).

¹⁷⁷ See, e.g., *Issue Brief: Rebuild the Nation’s Child Welfare System*, *supra* note 1; Sankaran, *supra* note 46, at 283–85 (outlining the myriad failures of the current child welfare system).

¹⁷⁸ Jessica Dixon Weaver, *The Principle of Subsidiarity Applied: Reforming the Legal Framework to Capture the Psychological Abuse of Children*, 18 VA. J. SOC. POL’Y & L. 247, 285 (2011); see also Boyer & Halbrook, *supra* note 64, at 311–12.

¹⁷⁹ See, e.g., D.C. CITIZEN REVIEW PANEL, *supra* note 65, at 24 (describing such a case).

filing for a termination of parental rights.¹⁸⁰ These stereotypes about individual cases play out against the backdrop of the larger public policy story of individual merit and responsibility that governs child welfare debates. As Annette Appell points out, this “privatization of social problems” allows the child welfare, welfare, and other public benefits systems to simultaneously dole out assistance to “morally worthy recipients” and punish the unworthy.¹⁸¹ Supporting families with housing, child care, and substance abuse treatment would not only be difficult, but would also constitute an admission that our narrative of individual choice and blame is erroneous.¹⁸²

4. *The Appeal of Adoption and Other Panaceas*

These factors are compounded by the widespread view of adoption as the only permissible solution for most children in foster care. Adoption is the ideal “simple” solution so appealing to the innate human desire for closure and simplicity—it provides a clear-cut solution (a new legally binding family) to a messy problem (child maltreatment) with no apparent inconvenient leftovers, such as residual parental rights or a recognition of past family relationships. For these reasons, adoption has tremendous symbolic value as a type of rebirth—it represents a “legal[] reincarnat[ion]” for these children akin to a “baptismal or conversion experience.”¹⁸³ Adoptive parents are viewed as the opposite of birth parents who are involved in the child welfare system. These “good” parents are typically middle class and thus can bring the child into a new socioeconomic milieu and a higher social status.¹⁸⁴ As Naomi Cahn describes the history of adoption, it is “a means of socializing culturally disfavored children—of removing them and placing them in middle-class homes.”¹⁸⁵

Adoption’s neat fit into the two-tiered parenthood system has led to its increasing predominance as the panacea for child maltreatment.¹⁸⁶

¹⁸⁰ See, e.g., IOWA REPORT, *supra* note 90, at 9.

¹⁸¹ Annette R. Appell, “Bad” Mothers and Spanish-Speaking Caregivers 101 n.2 (William S. Boyd School of Law, Working Paper No. 07-07), available at <http://ssrn.com/abstract=1028890>.

¹⁸² Such an admission would also require us to take on responsibility as a society for the poverty and maltreatment so many children face, something far more difficult than blaming individual parents. For an historical account of the “transformation” in the goals of child welfare agencies from protecting children from poverty and other societal wrongs to protecting them from maltreatment by their mothers, see DUNCAN LINDSEY, *THE WELFARE OF CHILDREN* ch. 5 (2nd ed. 2004).

¹⁸³ Garrison, *supra* note 22, at 387.

¹⁸⁴ *Id.*

¹⁸⁵ Naomi Cahn, *Perfect Substitutes or the Real Thing?*, 52 DUKE L.J. 1077, 1090 (2003). This history includes the “orphan trains” of the late 19th century, on which thousands of children from recent immigrant, low-income, urban families were shipped west to be absorbed by more “American” farm families in the Midwest and West. *Id.* at 1097.

¹⁸⁶ See the discussion of ASFA’s prioritization of adoption and the discussion of higher funding levels for adoption, *supra* Part I.B.1. I plan to further explore the

This, combined with the culture of child welfare agencies, leads many caseworkers to see adoption as their only goal. As one caseworker put it: “[I]t’s the experience—my background, my love is adoption. That’s what I did for eight years. It really brings me a lot of joy. So, I still think in terms of adoption as the best option.”¹⁸⁷ This is particularly so for younger children who are more desired by adoptive parents.¹⁸⁸ Adoption thus is framed not as at the top of the permanency hierarchy, but as the *only* meaningful permanency option.

III. TWO RECENT CHILD WELFARE POLICY TRENDS FAIL TO SHIFT THE PARADIGM

The last decade has seen several apparent incursions into the “bad parent” story in the child welfare context, including the tremendous growth in subsidized guardianship as an alternative to adoption, and the enactment of reinstatement-of-parental-rights statutes, which allow a parent to regain her parental rights after they were terminated. These reforms were implemented in part to try to address some of the problems with the child welfare system outlined above. In particular, the reinstatement statutes reflect a recognition of the severe and growing problem of the many “legal orphans” aging out of foster care with no family connections and dire prospects.¹⁸⁹

These policy trends at first appear promising, but implicit bias, both on a systemic level and through individual workers, prevents them from being crafted or implemented to address the widespread economic and social factors underlying child maltreatment or to expand the notion of permanency much beyond adoption. Thus, rather than reflecting a new approach to child welfare or a recognition of the diverse reality of family structures and needs, these policy trends are driven largely by the desire for a “quick fix.”¹⁹⁰ Accordingly, the dominant discourse of parenting remains largely unchanged—a matter of individual responsibility or failure—and the reforms are doomed to failure from their inception.

construction of permanency and attachment theory to reflect normative family structures in a future piece, *Permanency Puzzle*.

¹⁸⁷ ANNA ROCKHILL ET AL., PORTLAND STATE UNIV., FINAL REPORT, TITLE IV-E WAIVER DEMONSTRATION PROJECT EVALUATION 2004–2009: SUBSIDIZED GUARDIANSHIP COMPONENT 82 (2009) [hereinafter OREGON REPORT] (alteration in original), available at http://web.archive.org/web/20100604181341/http://www.ccf.pdx.edu/cwp/pgCWP_evaluation.php.

¹⁸⁸ Telephone Interview with Jana Heyd, Attorney, Columbia Legal Services (July 5, 2011). The Washington state child welfare agency is opposed to the reinstatement of parental rights in any cases of younger children for this reason. *Id.*

¹⁸⁹ See *supra* Part I.B.2.b.

¹⁹⁰ The reinstatement statutes in particular reflect a somewhat desperate attempt by states to circumvent the harsh mandate of ASFA timelines without sacrificing federal funding.

A. *Subsidized Guardianship*

1. *State Laws*

Subsidized guardianship allows a child to live free of state intervention with an adult other than a parent, who is provided with a subsidy for the child's care.¹⁹¹ The guardian is legally responsible for the child and can make significant decisions on her behalf, but does not legally "replace" the parent as does an adult who adopts a child. Unlike adoption, most guardianship frameworks allow for some visitation or contact between the biological parent and the child.¹⁹² Although guardianship has been a custodial option for a long time, it was usually not subsidized until very recently, in contrast to foster care and adoption. Without this subsidy, caregivers outside of the foster care and adoption systems could only rely on the public assistance TANF rate, which is considerably lower than payments in the child welfare system, and so many caregivers could not afford to take on guardianship of children from foster care.¹⁹³

Subsidized guardianship as an option for children in the foster care system has grown extremely rapidly in the last 20 years. In 1990, only three states had subsidized guardianship statutes, whereas as of 2010, 40 states did.¹⁹⁴ The passage of the federal Fostering Connections to Success and Increasing Adoptions Act of 2008 (Fostering Connections Act) allowed states to use federal Title IV-E foster care funds for subsidized guardianship by relatives without a waiver, thus inspiring more states to enact such statutes.¹⁹⁵ The subsidy rates vary considerably among states, with some states providing a subsidy equivalent to the foster care and adoption assistance payments, and others providing considerably less.¹⁹⁶ Not surprisingly, the amount of the rate has a significant impact on the success or failure of a child's guardianship placement as it does in the adoption context.¹⁹⁷

¹⁹¹ For a general overview, see Cynthia Godsoe, *Subsidized Guardianship: A New Permanency Option*, 23 CHILD. LEGAL RTS. J., Fall 2003, at 11. ASFA defines guardianship as a "judicially created relationship between child and caretaker which is intended to be permanent and self-sustaining as evidenced by the transfer to the caretaker of [many] parental rights." *Id.* at 12 (quoting 42 U.S.C. § 675(7) (2000)).

¹⁹² See Schwartz, *supra* note 110, at 461, 472.

¹⁹³ See *id.* at 456.

¹⁹⁴ *Child Welfare in the United States*, CLASP (Jan. 2010), <http://www.clasp.org/admin/site/publications/files/child-welfare-financing-united-states-2010.pdf>.

¹⁹⁵ Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No. 110-351, 122 Stat. 3949. For instance, Michigan enacted a subsidized guardianship statute in 2009 and New York began such a program in 2010. Act of April 9, 2009, 2009 Mich. Pub. Acts 15; Act of July 2, 2010, ch. 58, 2010 N.Y. Laws 407.

¹⁹⁶ CHILDREN'S DEF. FUND, STATES' SUBSIDIZED GUARDIANSHIP LAWS AT A GLANCE 2 (2004), available at <http://www.childrensdefense.org/child-research-data-publications/data/state-subsidized-guardianship-laws.pdf>.

¹⁹⁷ See Mark F. Testa, *The Quality of Permanence—Lasting or Binding? Subsidized Guardianship and Kinship Foster Care as Alternatives to Adoption*, 12 VA. J. SOC. POL'Y & L. 499, 514 (2005) (noting that the payment rates affect permanency of all types, including in foster care and adoption); see also Leathers et al., *supra* note 113, at 428.

Most states limit subsidized guardianship to children leaving the child welfare system, usually those exiting foster care.¹⁹⁸ It is seen as a particularly appropriate placement for certain groups of children in foster care, such as older children who do not wish to be adopted and children in kinship care whose providers do not want to or cannot adopt.¹⁹⁹ Some states limit eligibility to those groups.²⁰⁰ Subsidized guardianship has been shown to have numerous positive outcomes for families involved with the child welfare system, including fewer children in foster care and shorter stays in care,²⁰¹ and more children achieving permanent placements.²⁰² It also brings significant fiscal savings for states because of decreased foster care caseloads. For instance, Massachusetts reported saving as much as \$10,000 per year on each case moved from foster care to guardianship and Illinois reported total savings of over \$54 million over five years.²⁰³

2. *Stock Stories About Ideal Families Lead to a Narrow Interpretation of Permanency*

Subsidized guardianship fails to significantly alter the public policy story in part because stereotypes about ideal family structures lead it to be viewed as a narrow exception for a select group of families who do not fit into the preferred categories of biological or adoptive families. For instance, federal and many state laws limit subsidized guardianship to kin caregivers.²⁰⁴ Restrictive definitions of kin often further narrow the programs.²⁰⁵

¹⁹⁸ CHILDREN'S DEF. FUND, *supra* note 196, at 1.

¹⁹⁹ See Schwartz, *supra* note 110, at 471.

²⁰⁰ See, e.g., CAL. WELF. & INST. CODE § 11386(e) (West 2012) (requiring child to be residing with relative guardian for six months and limiting eligibility to children at least 12 years of age); NEV. REV. STAT. § 422A.650(2) (2011) (requiring child to be placed with qualifying relative for not less than six months); see also CHILDREN'S DEF. FUND, *supra* note 196, at 15 tbl.III.

²⁰¹ Guardianship in some states has been shown to reduce stays in foster care from 22% to 43% or more. See CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., SUBSIDIZED GUARDIANSHIP: CHILD WELFARE WAIVER DEMONSTRATIONS ii, 18 (2011), available at <http://www.acf.hhs.gov/sites/default/files/cb/subsidized.pdf>.

²⁰² See Schwartz, *supra* note 110, at 457.

²⁰³ CHILDREN'S BUREAU, *supra* note 201, at 29; *Subsidized Guardianship*, NAT'L ABANDONED INFANTS ASSISTANCE RESOURCE CTR. 5 (Dec. 2005), http://aia.berkeley.edu/media/pdf/2005_subsidized_guardianship_fact_sheet.pdf; see also MARYLEE ALLEN & MARY BISSELL, CHILDREN'S DEF. FUND, EXPANDING PERMANENCY OPTIONS FOR CHILDREN: A GUIDE TO SUBSIDIZED GUARDIANSHIP PROGRAMS (2003), available at http://cdf.childrensdefense.org/site/DocServer/subsidy_guide.pdf?docID=917.

²⁰⁴ See CHILDREN'S DEF. FUND, *supra* note 196, at 3, 8–9 (outlining numerous states restricting guardianship to kin caregivers).

²⁰⁵ For example, see Idaho's definition of relative: "An individual having a relationship with a child by blood, marriage or adoption. Such individuals include grandparents, siblings and extended family members such as aunts, uncles and cousins." *Standard for Guardianship Assistance*, IDAHO DEP'T HEALTH & WELFARE 2 (July 12, 2011), http://www.healthandwelfare.idaho.gov/Portals/0/Children/AdoptionFoster/Guardianship_Assistance_Standard.pdf.

Subsidized guardianship also remains vastly underutilized in practice. For instance, in 2011, only 4% of children in foster care had subsidized guardianship as their goal, far less than the 25% with an adoption goal, and even less than those having the admittedly undesirable goals of long term foster care (6%) or emancipation (5%).²⁰⁶ Experts studying subsidized guardianship systems have noted the fact that it is frequently not offered to families in situations where it is an appropriate option.²⁰⁷

The desire for simplicity and stock stories about worthy families result in a continued priority of adoption over subsidized guardianship. Accordingly, virtually all states require that adoption be ruled out before subsidized guardianship is an option, and continue to fund adoption at higher rates than guardianship.²⁰⁸ These “rule-out” requirements are contradicted by studies showing that guardianship usually feels as permanent and secure as adoption for children, and that where the programs are funded at the same levels, guardianship and adoption are equally likely to succeed over time.²⁰⁹

Consistent with the implicit cognition literature discussed above, unconscious biases can lead workers to make decisions based on entrenched practices and their own preferences, rather than on empirical research or the needs of families. Accordingly, workers often refuse to believe the data that subsidized guardianship is usually as permanent as adoption; as one worker put it:

[Subsidized guardianship] is not the most permanent plan for the kids. Not the same ownership, level of responsibility, or commitment to the child. The kid still knows that that’s the guardian, not the parent. The kid knows that this person didn’t want to adopt. That’s why we always strive for adoption, because the psychological benefits *are much better for the kid*.²¹⁰

²⁰⁶ AFCARS 2011, *supra* note 2, at 1; *see also* OREGON REPORT, *supra* note 187, at 9–10 (finding that subsidized guardianship is underutilized).

²⁰⁷ OREGON REPORT, *supra* note 187, at 10; *see also* CHILDREN’S BUREAU, *supra* note 201, at iii.

²⁰⁸ CHILDREN’S DEF. FUND, *supra* note 196, at 14–15 tbl.III. The adoption rule-out is also a requirement under the federal Fostering Connections Act. 42 U.S.C. § 673(d)(3)(A)(ii) (Supp. II 2008). Sometimes this finding of unadoptability is to be made by the court, and sometimes the child welfare agency is the initial gatekeeper, having the power to screen cases before subsidized guardianship can even be proposed as an option in court. This is the case, for instance, in New York.

²⁰⁹ *See* discussion *infra* Part III.A.2; *see also* Mary Bissell & Karina Kirana, Children’s Defense Fund, *Establishing Permanence: How Permanent Is It?*, in USING SUBSIDIZED GUARDIANSHIP TO IMPROVE OUTCOMES FOR CHILDREN 13, 14–15 (Mary Bissell & Jennifer L. Miller eds., 2004), *available at* <http://www.childrensdefense.org/child-research-data-publications/data/using-subsidized-guardianship-improve-outcomes.pdf>. (noting the extremely low dissolution rates of the nation’s largest subsidized guardianship programs in Illinois and California).

²¹⁰ OREGON REPORT, *supra* note 187, at 92 (emphasis added).

Acting upon their unsupported bias towards adoptive families, many workers fail to inform families about guardianship.²¹¹ Other workers mislead caregivers about guardianship or “pressure” them to go along with the agency preference for adoption.²¹² Workers sometimes even threaten families with removal of the children in their care or actually move teenagers out of secure kinship homes into non-kinship pre-adoptive homes if the kinship caregiver refuses to adopt.²¹³ These agency practices are directly contradictory to the psychological literature on permanency and the likelihood of adoption disruption, particularly for older children.

B. Reinstatement of Parental Rights Statutes

1. State Laws

Another very recent trend illustrating a potential incursion into the dominant narrative is the reinstatement of parental rights after a termination. Eleven states have enacted statutes in the last six years permitting the reinstatement of parental rights, and several more have similar legislation pending. California was the first state to pass reinstatement legislation, in 2005,²¹⁴ and since then, Nevada, Washington, Louisiana, Oklahoma, Illinois, Hawaii, Alaska, New York, North Carolina, and Maine have enacted similar legislation.²¹⁵ Minnesota and Georgia have introduced similar bills.²¹⁶ The laws differ in several key respects, including who may petition the court for reinstatement and under what circumstances. For instance, some states only allow the child (or child’s lawyer) to petition for reinstatement of parental rights.²¹⁷ Nevada allows only the child or the child’s legal custodian or guardian to do so.²¹⁸ In others, only

²¹¹ *Id.* at 10, 26; see also CHILDREN’S BUREAU, *supra* note 201 at iii (finding that workers “expressed reluctance to offer [subsidized guardianship] due to deep-seated professional beliefs regarding the preferability of adoption”).

²¹² OREGON REPORT, *supra* note 187, at 75.

²¹³ Kendra Hurley, *Preserving Family Ties*, 15 CHILD WELFARE WATCH 8, 11–13 (2008); see also MaryLee Allen & Beth Davis-Pratt, *The Impact of ASFA on Family Connections for Children*, in CTR. FOR THE STUDY OF SOC. POLICY & URBAN INST., INTENTIONS AND RESULTS: A LOOK BACK AT THE ADOPTION AND SAFE FAMILIES ACT 70, 74 (2009), http://www.urban.org/UploadedPDF/1001351_safe_families_act.pdf (noting the inconsistent application of ASFA in California and also finding that the prioritization of adoption led caseworkers to pressure caregivers to adopt or risk losing custody of, and contact with, children in their care).

²¹⁴ Act of Oct. 7, 2005, ch. 634, 2005 Cal. Stat. 4837.

²¹⁵ ALASKA STAT. § 47.10.089 (2010); HAW. REV. STAT. § 571-63 (2006); 705 ILL. COMP. STAT. ANN. 405/2-28, 405/2-34 (Supp. 2012); LA. CHILD. CODE ANN. art. 1051 (Supp. 2012); ME. REV. STAT. tit.22, § 4059 (2011); NEV. REV. STAT. § 128.170 (2011); N.Y. FAM. CT. ACT. § 635–37 (McKinney Supp. 2012); Act of June 24, 2011, ch. 295, 2011 N.C. Sess. Laws 1157; OKLA. STAT. ANN. tit. 10A, § 1-4-909 (2009); WASH. REV. CODE ANN. § 13.34.215 (West Supp. 2012).

²¹⁶ H.B. 641, 151st Gen. Assemb., Reg. Sess. (Ga. 2011); S.B. 127, 151st Gen. Assemb., Reg. Sess. (Ga. 2011); H.B. 749, 87th Leg. (Minn. 2011).

²¹⁷ See, e.g., CAL. WELF. & INST. CODE § 366.26(h) (3) (C) (i) (3) (West 2012).

²¹⁸ NEV. REV. STAT. § 128.170.

the state child welfare agency,²¹⁹ or a parent who voluntarily relinquished his or her parental rights, may do so.²²⁰ Still other states grant multiple parties standing to bring such petitions including parents whose rights have been involuntarily terminated and the child protective agency,²²¹ or the agency and the child, or all three.²²²

The cases eligible for reinstatement proceedings vary. Every state mandates a certain time period between the termination and a reinstatement proceeding, from one year, as in Hawaii, to two years, as in New York, or even three years, as in California, Illinois, Oklahoma and Washington.²²³ The most common findings required for reinstatement include that a child is not likely to be adopted or otherwise achieve “permanency”²²⁴ or is not in a “permanent” placement,²²⁵ and that reinstatement is in the child’s best interest.²²⁶ Additionally, a few states require findings that the parent is capable of providing appropriate care for the child or even that there has been a “material change” in the parent’s circumstances.²²⁷ Every state except Nevada requires that the reinstatement be proven by clear and convincing evidence, the same standard used in terminations of parental rights.²²⁸ The consent of one or more parties to the original termination is usually required, for instance

²¹⁹ For example, in Illinois, a motion to reinstate parental rights can only be filed by the Department of Children and Family Services. 705 ILL. COMP. STAT. ANN. § 405/2-34.

²²⁰ See, e.g., ALASKA STAT. § 47.10.089. Advocates have postulated that this distinction might have been made because parents who voluntarily surrender their rights are more worthy than those whose rights are terminated after a contested hearing. However, this distinction may not be so meaningful as parents often do not actually surrender their rights voluntarily; rather, they are pressured to do so or do so under threat of a termination proceeding.

²²¹ See, e.g., HAW. REV. STAT. § 571-63 (2006).

²²² See, e.g., N.Y. FAM. CT. ACT. § 636 (McKinney Supp. 2012).

²²³ CAL. WELF. & INST. CODE § 366.26; HAW. REV. STAT. § 587A-34; 705 ILL. COMP. STAT. ANN. 405/1-18; Family Court Act, N.Y. FAM. CT. ACT § 635 (West Supp. 2012); OKLA. STAT. ANN. tit. 10A, § 1-4-909 (West 2009); WASH. REV. CODE ANN. § 13.34.215 (West Supp. 2012).

²²⁴ CAL. WELF. & INST. CODE § 366.26; 705 ILL. COMP. STAT. ANN. § 405/2-34.

²²⁵ WASH. REV. CODE ANN. § 13.34.215. This has been interpreted by attorneys and caseworkers to include situations where the child is in a pre-adoptive placement, with a guardian, or with a third party custodian. Telephone Interview with Jana Heyd, *supra* note 188.

²²⁶ Washington, for example, lists several factors for courts to consider when making a “best interests” determination, including the age, maturity, and ability of the child to express a preference. WASH. REV. CODE ANN. § 13.34.215(7).

²²⁷ HAW. REV. STAT. § 587A-34; ME. REV. STAT. tit.22, § 4059 (2011) (requiring the petition to show facts constituting “a substantial change in circumstances” and requiring the judge to consider extent to which parent has “remedied the circumstances that resulted in the termination of parental rights”).

²²⁸ NEV. REV. STAT. § 128.190(3) (2011) (requiring preponderance of the evidence standard); Santosky v. Kramer, 455 U.S. 745, 747-48 (1982).

the child²²⁹ and sometimes the parent²³⁰ or agency.²³¹ In some jurisdictions, the reinstatement may be conditionally granted to allow for parent-child visitation or reunification before parental rights are permanently reinstated.²³² Some states, such as New York, exclude cases of abuse and limit reinstatement to terminations based on abandonment, mental illness, or permanent neglect.²³³ Finally, about half the states limit reinstatement to cases involving older youth, those who are the hardest to place for adoption and who usually must consent to adoption under state law.²³⁴

The impetus behind reinstatement statutes is largely uniform: they are an attempt to address the large number of legal orphans created by the increase in terminations under ASFA.²³⁵ This problem has been increasingly recognized by courts, policy institutes and others.²³⁶ The legislative history of reinstatement statutes acknowledges that legal orphans face both social stigma and financial disadvantages,²³⁷ that children do better if they “have a significant connection to an adult,”²³⁸ and that states

²²⁹ HAW. REV. STAT. § 571-63; NEV. REV. STAT. § 128.190 (for children 14 and older).

²³⁰ NEV. REV. STAT. § 128.170 (2011) (requiring the “natural parent or parents” written consent).

²³¹ New York, for instance, requires the consent of all three parties but the failure to obtain consent of the agency can be excused if the court finds consent was denied without good cause. *See* N.Y. FAM. CT. ACT. § 637 (McKinney Supp. 2012).

²³² *See, e.g.*, N.Y. FAM. CT. ACT. §§ 635–637.

²³³ *See* N.Y. FAM. CT. ACT. § 637.

²³⁴ *See, e.g.*, 705 ILL. COMP. STAT. ANN. § 405/2-34 (Supp. 2012) (child 13 or older or the younger sibling of child 13 or older seeking reinstatement); NEV. REV. STAT. § 128.190 (child 14 or older who consents, or if child is under 14, court shall specify the factual basis of the best interest finding); N.Y. FAM. CT. ACT. § 635 (child 14 or older); WASH. REV. CODE ANN. § 13.34.215 (West Supp. 2012) (child 12 or older, or younger with a showing of good cause).

²³⁵ *See, e.g.*, Letter from Nancy Martinez, Director, Strategic Planning & Policy Development, to Comm’rs of Social Servs., (Feb. 10, 2011), *available at* http://www.ocfs.state.ny.us/main/policies/external/OCFS_2011/INFs/11-OCFS-INF-02%20Restoration%20of%20Parental%20Rights.pdf; CAL. SEN. COMM. ON JUDICIARY, BILL ANALYSIS, Assemb. Bill 519, 2005–2006 Reg. Sess., at 2–3 (2005), *available at* http://info.sen.ca.gov/pub/05-06/bill/asm/ab_0501-0550/ab_519_cfa_20050607_161843_sen_comm.html.

²³⁶ *See, e.g.*, *In re Jerred H.*, 17 Cal. Rptr. 3d 481, 485–86 (Cal. Ct. App. 2004) (lamenting the “harshness” of a legal orphan’s situation and calling upon the state legislature to address this issue); *see also Resolution Calling for Judicial Action to Reduce the Number of Legal Orphans at Risk of Aging out of Foster Care in the United States*, NAT’L COUNCIL OF JUV. & FAM. CT. JUDGES (Mar. 21, 2012), http://www.ncjfcj.org/sites/default/files/Resolution_LegalOrphans_fnl-3-21-12.pdf.

²³⁷ *See, e.g.*, CAL. SEN. COMM. ON JUDICIARY, *supra* note 235, at 3 (citing both the stigma and the fact that legal orphans are entitled to neither parental support nor inheritance from family members).

²³⁸ Letter from Nancy Martinez to Comm’rs of Social Servs., *supra* note 235, at 2.

have failed to find adoptive homes for many children.²³⁹ Supporters of the California legislation argued successfully that the creation of large numbers of legal orphans not only reflected poorly upon the state's child welfare system but also "undermine[d] public confidence in judicial determinations."²⁴⁰

These statutes are being offered as the solution to the complex problems of child maltreatment and permanency. States' eagerness to address these problems is clear: the reinstatement statutes appear to have enjoyed broad support from all players in the child welfare system in most jurisdictions, variously being sponsored or supported by parents' groups, children's advocates, the state child welfare agency, and the judiciary.²⁴¹ In most states, there was virtually no opposition to the legislation, and in some, not even any real discussion.²⁴² This silence is possibly due to the pragmatic realization that such measures are necessary to help children in foster care, but do not fit in with the dominant child welfare paradigm.

2. *Implicit Bias Results in an Unchanged Parenthood Framework*

Reinstatement statutes perpetuate the flawed public policy story that child maltreatment is an individual problem caused by deviant parents. The focus is not on preventing child maltreatment or on determining whether these parents are now better able to care for their children, but rather on whether these children have found or are likely to find another, "better" family through adoption.²⁴³ One state family court judge acknowledged this "fall back" notion explicitly: "These children don't forget their families. They see value in them where we might not. *When no one else has stepped in to establish that parenting relationship*, it is just mean not to remove that legal barrier to restore that family in some form."²⁴⁴ Reflecting this view, the reinstatement statutes typically require a finding

²³⁹ CAL. SEN. COMM. ON JUDICIARY, *supra* note 235, at 3 (citing a report that, as of 2002, there were 5,846 legally freed children in California not yet placed in adoptive homes).

²⁴⁰ Children's Law Center of Los Angeles, *Addressing the "Legal Orphans" Problem* PARENTATTORNEY.ORG, <http://parentattorney.org/wp-content/uploads/2011/08/legal-orphans-proposal.doc>.

²⁴¹ For instance, the New York bill was sponsored by the State Office of Children and Family Services and supported by the Legal Aid Society (which represents children in abuse and neglect proceedings) and the parents' bar. Similarly, the California bill was co-sponsored by the Children's Law Center and the Judicial Council of California.

²⁴² E-mail from Wendy C. Sotolongo, Parent Representation Coordinator, Indigent Def. Servs., N.C., to author (June 20, 2011) (on file with author).

²⁴³ Of course many parents whose rights have been terminated are capable of improving and properly caring for their children, but the focus in the reinstatement statutes is not so much on this as on the child's status as a legal orphan.

²⁴⁴ *Assembly Panel Votes for Parental Rights Bill*, LAS VEGAS REVIEW-JOURNAL, Apr. 5, 2007, at 3B (emphasis added) (quoting Nevada Family Court Judge Gerald Hardcastle in support of the Nevada reinstatement statute).

that the child is not likely to be adopted or are frequently limited to groups of children who are “hard to adopt,” such as older children.²⁴⁵

The availability heuristic thus continues to channel all approaches to maltreatment at punishing and “fixing” parents. Rather than address the underlying risks and challenges to families that result in child welfare involvement, reinstatement statutes instead purport to distinguish between the incorrigibly bad parents and the select few bad parents who can be redeemed. Accordingly, reinstatement is framed as an exceptional measure for morally worthy families. As a supporter of the proposed Minnesota legislation put it: “[T]hose [who] . . . *deserve to be a reunited family* . . . should have a second chance.”²⁴⁶ This dialogue perpetuates the stock stories of good and bad families dominating public discussion of the child welfare system. In fact, the dichotomy between biological and adoptive parents is so entrenched in this realm that the new laws are often misunderstood and framed in terms of biological parents “adopting” their children.²⁴⁷ Yet none of the statutes or agency guidelines include any specific indications of what this deserving family would look like or how much improvement a parent must show in order to earn reinstatement of her rights. Instead the choice is almost entirely discretionary, rendering decision-makers particularly susceptible to the stereotypes about “bad” parents in the child welfare system and to other implicit biases such as confirmation bias.²⁴⁸

This focus on the individual parent’s pathology and moral merit is reflected in the lack of services to help families achieve reinstatement. Not one of the statutes has services attached. Families being “restored” need assistance with housing, child care, or substance abuse treatment to avoid breaking down because of the same poverty-related or other risk factors which resulted in a termination in the first instance. The lack of services for parents whose rights are being reinstated contrasts starkly with the treatment of adoptive families, who are entitled both to services and financial assistance so that they do not fail. This lack of services renders reinstatement a hollow promise. Even parents’ attorneys may dis-

²⁴⁵ See, e.g., WASH. REV. CODE ANN. § 13.34.215 (West Supp. 2012).

²⁴⁶ Lee Ann Schutz, *Reversing Parental Terminations Calls for Caution*, MINN. HOUSE OF REPRESENTATIVES PUB. INFO. SERVS. (Apr. 18, 2011), <http://www.house.leg.state.mn.us/hinfo/sessiondaily.asp?storyid=2644> (emphasis added).

²⁴⁷ See Leah Hope, *Law Lets Woman Adopt Her Own Children*, ABC LOCAL (Jul. 5, 2011), <http://abclocal.go.com/wls/story?section=news/local&id=8232991>.

²⁴⁸ Some statutes include common family law terms such as “best interests of the child” and “changed circumstances” and a few even outline some factors to consider, but largely the decision remains almost completely discretionary. Accordingly the availability and success of reinstatement primarily turns on the caseworker. See Email from Michael Heard, Soc. Servs. Manager, Wash. State Office of Pub. Def., to author (June 1, 2011) (on file with author); see also OREGON REPORT, *supra* note 187, at 73 (discussing this dynamic in the subsidized guardianship context).

suade some of their more struggling clients from pursuing reinstatement—without the proper supports, it is a set-up for failure.²⁴⁹

Furthering the underlying narrative that parents in public family law are unworthy, they are almost completely excluded from the reinstatement process in numerous states. For instance, only New York allows parents standing to petition for reinstatement. In contrast, the supporters of the California legislation secured passage of the bill only after emphasizing that parents would not have access to the reinstatement process, so that they could not interfere with other permanency planning for their children, such as adoptions.²⁵⁰ In numerous states, parents do not have standing as parties to the proceeding or are not entitled to counsel.²⁵¹ This exclusion not only reflects a negative, even biased, view of the parents in these cases, but is also impractical since the parents' exclusion makes it more difficult for courts and child welfare agencies to adequately assess the parents' capabilities and the best interests of the children.

As a result, reinstatement is underutilized. No state appears to track reinstatement cases and there are no published cases to date addressing the merits of a reinstatement petition.²⁵² Some of this is to be expected given how new the statutes are, but there are few petitions even in the states that have had reinstatement for over six years.²⁵³ Reinstatement is not being offered to families because caseworkers, lawyers, and others involved in the child welfare system often “pre-screen” arguably appropriate cases.²⁵⁴ Confirmation bias makes this pre-screening a difficult barrier to overcome. Anecdotal evidence²⁵⁵ suggests that many case workers and others working with families in the child welfare system are firmly entrenched in the belief that “once a bad parent, always a bad parent.”²⁵⁶

²⁴⁹ Telephone Interview with Jana Heyd, *supra* note 188.

²⁵⁰ Susan Getman & Steve Christian, *Reinstating Parental Rights: Another Path to Permanency?*, 26 PROTECTING CHILDREN, no. 1, 2011, at 58, 65. This threat is quite unlikely since many of the children in foster care, and, by definition, most of the children eligible for reinstatement, do not have adoptive prospects. Not surprisingly, then, there are few to no reported instances of parents interfering with adoptions in this fashion.

²⁵¹ *Id.* at 63.

²⁵² A few courts have discussed the statutes, *see, e.g., In re J.R.*, 230 P.3d 1087, 1090 (Wash. Ct. App. 2010) (construing the reinstatement statute language), but only one appears to have applied a reinstatement statute to make findings in a particular case, *see In re Sheila CC v. Comm’r of Soc. Servs. Of Schenectady Cnty.*, 950 N.Y.S.2d 919, 919 (N.Y. App. Div. 2012) (affirming dismissal of mother’s petition to restore her parental rights on the grounds that the youngest child had been adopted and the other two children were not “[14] years of age or older” as required by N.Y. FAM. CT. Acr. § 635(d) (McKinney Supp. 2012)).

²⁵³ Telephone Interview with Elizabeth Thornton, Attorney, Am. Bar Ass’n Ctr. on Children and the Law (July 6, 2011).

²⁵⁴ Telephone Interview with Jana Heyd, *supra* note 188.

²⁵⁵ Anecdotal evidence is the only available source to date about the reinstatement process as no study yet appears to exist on this new policy trend.

²⁵⁶ Email from Michael Heard, *supra* note 248 (also opining that workers are loathe to use the reinstatement statutes as it constitutes an admission their agency was

Rather than assess the deeper causes of child maltreatment, workers may erect barriers to reinstatement out of a stereotype that parents whose rights have been terminated will never be worthy of parenthood.

The fact that the institutional or, even more problematically, individual, players in the child welfare system often remain the same in reinstatement cases worsens this dynamic. It is difficult for a case worker to change her attitude towards a parent she had earlier seen as irredeemable:

To get to the point of the termination of parental rights . . . you need to believe that a parent won't change . . . [while] a reinstatement of parents' rights requires that both agency leadership and social workers need to be open to a new view of the parent and believe that parents can change.²⁵⁷

And it is not just agency personnel who remain the same: lawyers for the state, for the child, and even for the parent, as well as judges, are often repeat players and must be open to returning a child to parents whom they may have previously thought incorrigible.²⁵⁸ Even where the players are different, the desire for systemic continuity renders a new view of a case unlikely. As one attorney pointed out: "Many judges are reluctant to restore rights to someone that another judge has taken them away from . . ." ²⁵⁹ This confirmation bias makes shifting the narrative as to individual families very difficult.²⁶⁰

IV. REMAPPING PUBLIC PARENTHOOD

Parenthood in the public family law sphere must be envisioned in a different way in order to effectively address child maltreatment and equally treat all children and families. Tweaking concepts or slight shifts in policy are not enough to improve the massively dysfunctional child welfare system and bridge the private and public concepts of parenthood. Only with an alternative vision will the dialogue move to more effective alternatives.²⁶¹ Until the legal system begins to consider parenthood and

mistaken about the parent). Lawyers and child welfare personnel in other states echo this problem. See Kendra Hurley, *When You Can't Go Home*, 15 CHILD WELFARE WATCH 18, 20 (2008) (discussing the views of child welfare workers).

²⁵⁷ Getman & Christian, *supra* note 250, at 66.

²⁵⁸ One children's attorney described a reinstatement case as being particularly difficult for precisely this reason: the state agency attorney was the same one who had represented the state in the termination of the parent's rights and was very loathe to change her view of the parent.

²⁵⁹ Hope, *supra* note 247.

²⁶⁰ See Burke, *supra* note 19, at 1606 (discussing the analogous situation of prosecutors' confirmation bias resulting in a reluctance to reverse charging decisions or otherwise change their views about a particular case).

²⁶¹ See Blasi, *supra* note 132, at 920 (noting that policy makers must be offered "alternative visions" in order to approach problems in a new way). Alternative visions are certainly possible. Although a thorough comparative analysis is beyond the scope of this Article, it is worth noting that most European countries do not address child

child maltreatment differently, implicit cognitive biases will prohibit meaningful change in the child welfare arena.

On the macro level, a new cognitive narrative can serve as the baseline for more realistic and effective legislation in this realm.²⁶² The default should change—rather than assuming parents are bad and irredeemable, the legal framework should posit parents as supportable resources for their children. Relying on the empirical evidence about risk factors and effective prevention and treatment, rather than cognitive shortcuts about certain categories of parents, will lead to better child welfare policies.²⁶³ Such a shift can also lead to changed behavior by decision-makers in the system. Although alleviating the implicit cognitive biases of key decision-makers is not easy, studies show that implicit cognitive processes may be controllable.²⁶⁴ Awareness of these implicit biases is a significant first step.²⁶⁵ Broadening information streams, following an objective framework, and building in outside assessments for a “fresh” look at cases can also help to shift the dialogue on a more micro level.²⁶⁶ A recent pilot project to address implicit bias among family court judges indicates that such approaches can be effective at reunifying children and their parents and perhaps at reducing the overrepresentation of children of color in the foster care system.²⁶⁷

maltreatment as we do. For instance, European countries terminate rights much less frequently than our system does, and countries including Belgium, the Netherlands and Germany address it preventively using home health visitors and parent education. See Sankaran, *supra* note 46, at 295–96.

²⁶² See van Ryn & Fu, *supra* note 121, at 252 (concluding that exploration of the ways in which implicit social cognition impacts health care delivery is essential to any reform in this realm).

²⁶³ For instance, a major impediment to implementing subsidized guardianship in an effective way for more families is the cultural value placed upon adoption in the child welfare public policy story. To this end, caseworkers, potential guardians, attorneys, judges and others working with families in the child welfare system need to be properly informed about the pros and cons of each option and to understand the permanency potential of each.

²⁶⁴ Margo J. Monteith & Corrine I. Voils, *Exerting Control over Prejudiced Responses*, in *COGNITIVE SOCIAL PSYCHOLOGY: THE PRINCETON SYMPOSIUM ON THE LEGACY AND FUTURE OF SOCIAL COGNITION* 375 (Gordon B. Moskowitz ed., 2001); see also Burke, *supra* note 19, at 1616–18 (arguing for training of prosecutors to overcome confirmation and other implicit cognitive biases in their decision-making); van Ryn & Fu, *supra* note 121, at 252.

²⁶⁵ See Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 *NOTRE DAME L. REV.* 1195, 1203 (2009).

²⁶⁶ *Id.* at 1230–31 (recommending audits of judicial decision-making and increased use of three-judge panels at the trial court level to mitigate bias of a sole decision-maker); see also Burke, *supra* note 19, at 1616–21 (making similar training recommendations for prosecutors to overcome confirmation and other implicit cognitive biases).

²⁶⁷ See Irene Sullivan, *Juvenile Judges Find Benchcards Helpful in Reuniting Families*, *YOUTH TODAY* (Aug. 18, 2011), http://www.youthtoday.org/view_blog.cfm?blog_id=518 (outlining a 45% increase in the number of children returned home in a pilot project to “attack implicit bias” where juvenile judges used a checklist developed by

Legal scholars have proposed various approaches to the child welfare system. For instance, Clare Huntington has suggested moving away from a rights-based approach to a problem-solving framework.²⁶⁸ Marsha Garrison and Annette Appell have posited a preventive, public health approach to child welfare.²⁶⁹ Martin Guggenheim incorporates both points, arguing for a preventive approach to help families before they are in crisis and for an understanding of children's rights as intrinsically embedded with those of the adults in their lives, particularly their parents.²⁷⁰ In this section, I aim to build on these perspectives by positing a preventive approach to child maltreatment and a remapping of the parent-child relationship for families who have been separated because of child maltreatment, drawing both from public health and private family law approaches. This framework should inform state policy at all points of intervention: before, during, and after involvement in the child welfare system.²⁷¹ Although I offer no quick "fixes" to this complex problem, for I think no real fix can come until the public policy story changes, I will flag some promising child welfare initiatives which signal the potential for a new story.

A. Considerations

1. Recognizing Child Maltreatment as a Social Problem

Shifting the focus from individual bad parents to the environmental factors underlying child maltreatment is essential to any effective effort to reduce child maltreatment. The data is clear that the risk factors for most child maltreatment have more to do with contextual, environmental conditions such as poverty, than with the individual characteristics or choices of parents.²⁷² To this end, the legal framework should be in-

the National Council of Juvenile and Family Court Judges); NAT'L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, RIGHT FROM THE START: THE CCC PRELIMINARY PROTECTIVE HEARING BENCHMARK 9-10 (2010), available at http://www.ncjfcj.org/sites/default/files/Right%20from%20the%20Start_1.pdf (outlining "reflection questions" which can allow judges to "acknowledge [their] 'implicit bias[es]' and to become more conscious about potential influences on their decision-making process").

²⁶⁸ See Clare Huntington, *Mutual Dependency in Child Welfare*, 82 NOTRE DAME L. REV. 1485 (2007) (suggesting reframing the family-state relationship as one of mutual dependency in order to accomplish better outcomes in child welfare policy).

²⁶⁹ Garrison, *supra* note 17, at 599; Appell, *supra* note 95, at 298 (each suggesting a public health framework for addressing child maltreatment).

²⁷⁰ MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS 174-81 (2005).

²⁷¹ Ultimately, the ASFA statutory framework should be replaced by a more effective approach to child maltreatment and permanency, based on prevention of proven risk factors rather than post hoc and stigmatized intervention and the rush to terminate parental rights. Until then, however, a new conception of parenthood can inform state policies and practices even within the ASFA framework.

²⁷² See *supra* Part I.B.2.a. A small percentage of child maltreatment, such as some of the sexual and physical abuse cases, may be very difficult to predict or prevent, but

formed by the approach to child maltreatment in other disciplines. For instance, the medical community has expressly identified child maltreatment as a preventable public health problem.²⁷³ This approach, endorsed by the Centers for Disease Control (CDC), the American Psychological Association, and other non-legal actors, offers valuable insights for crafting effective child welfare interventions.²⁷⁴

A public health framework focuses on a neutral and empirically-based assessment of the risk factors for child maltreatment and seeks out interdisciplinary strategies, recognizing that child maltreatment is a complex issue requiring multiple areas of expertise.²⁷⁵ This entails first defining child maltreatment to focus on measurable and real risk of harm to children, rather than subjective judgments about parenting behaviors. A narrow definition of child maltreatment will lead to more effective and legitimate state interventions.

Moreover, rather than look at the problem one parent or family at a time, a public health approach assesses it from a “population” or community-wide perspective.²⁷⁶ Interventions could include anti-poverty measures, programs specifically designed to prevent child maltreatment and strengthen families, or ideally both.²⁷⁷ Programs should aim to facilitate social change and to help families at risk, rather than intervene after the fact and blame or punish individual parents. Such an approach is increasingly used to address a variety of social problems previously deemed to be the province of individual deviance, such as smoking, nutrition and both family and community violence.²⁷⁸

most maltreatment cases entail well documented risk factors that can be targeted by prevention programs. See, e.g., APA, *supra* note 8, at 7, 8 tbl.1.

²⁷³ See, e.g., *Promoting Safe, Stable and Nurturing Relationships: A Strategic Direction for Child Maltreatment Prevention*, CENTERS FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/violenceprevention/pdf/CM_Strategic_Direction—OnePager-a.pdf (defining child maltreatment as a “significant public health problem” in the U.S.).

²⁷⁴ See, e.g., W. Rodney Hammond, Ctrs. For Disease Control & Prevention, *Public Health and Child Maltreatment Prevention: The Role of the Centers for Disease Control and Prevention*, 8 CHILD MALTREATMENT 81 (2003); APA, *supra* note 8, at 5 (defining child maltreatment as a “serious but potentially preventable public health problem”).

²⁷⁵ See Hammond, *supra* note 274, at 82.

²⁷⁶ See Scott Burris, *From Health Care Law to the Social Determinants of Health: A Public Health Law Research Perspective*, 159 U. PA. L. REV. 1649, 1649 (2011) (noting that population health is “shaped powerfully” by the social determinants of health including race, income and behaviors); Wilson, *supra* note 39, at 282 n.156 (noting that public health interventions assess the prevailing conditions underlying illness or injury).

²⁷⁷ Because poverty is a demonstrated risk factor for child maltreatment, see *supra* Part I.B.2.a, support for poor families and anti-poverty programs will also address child maltreatment. Garrison, *supra* note 17, at 612.

²⁷⁸ See, e.g., Hammond, *supra* note 274, at 81. For a recent argument for the application of a public health framework to a “legal” problem, see generally Jonathan Todres, *Moving Upstream: The Merits of a Public Health Law Approach to Human Trafficking*, 89 N.C. L. REV. 447 (2011).

A preventive approach has numerous advantages both for individual families and for societies. First, preventing child maltreatment can avoid the traumatic and costly impact of maltreatment on children.²⁷⁹ Supporting families before they are in crisis would also entail fewer family disruptions and the concomitant harms of children's removal to the foster care system.²⁸⁰ Second, a preventive approach reduces the stigma and likelihood of bias so endemic to our current system. Third, such an approach would cost less than the current post hoc reliance on foster care, adoption, and the court system.²⁸¹

One preventive approach with significant potential is home visiting.²⁸² Home visiting programs can vary widely but usually entail a nurse or other professional visiting new mothers or other at-risk parents regularly and helping them learn parenting skills. Some have proven very successful at reducing child maltreatment in a cost-efficient fashion; one program, the Nurse–Family Partnership, has been found to reduce child maltreatment by 79% among a high-risk population.²⁸³ It also greatly reduced related social problems including school failure and juvenile delinquency.²⁸⁴ Its potential to reach and support at-risk families has led home visiting to be endorsed by scholars at both ends of the child welfare spectrum, i.e. those who are more family preservation oriented and those who are more adoption oriented.²⁸⁵

²⁷⁹ See *supra* notes 79–88, 91 and accompanying text.

²⁸⁰ *Id.*

²⁸¹ See Huntington, *supra* note 268, at 1518–19. Currently, states spend billions of dollars on foster care and adoptions, not even counting the costs of maltreatment and the legal system, dwarfing the spending on preventive services. Per the latter, states spent only \$250 million total on home visiting programs in 2008. See KAY JOHNSON, NAT'L CTR. FOR CHILDREN IN POVERTY, STATE-BASED HOME VISITING: STRENGTHENING PROGRAMS THROUGH STATE LEADERSHIP 4 (2009), available at http://www.nccp.org/publications/pdf/text_862.pdf.

²⁸² Current programs could also be reconfigured to work in a preventive fashion. For instance, subsidized guardianship could be used as a preventive measure to avoid removing children into foster care. A few states do use it in this way currently and some advocates have recommended broadening this preventive use. See Eliza Patten, *The Subordination of Subsidized Guardianship in Child Welfare Proceedings*, 29 N.Y.U. REV. L. & SOC. CHANGE 237, 237 (2004).

²⁸³ David Olds et al., *Prenatal and Early Childhood Nurse Home Visitation*, JUV. JUST. BULL. (U.S. Dep't of Justice), Nov. 1998, at 3, available at <https://www.ncjrs.gov/pdffiles/172875.pdf>.

²⁸⁴ See *id.* at 3, 5.

²⁸⁵ See, e.g., BARTHOLET, *supra* note 15, at 165 (noting the promise of such programs with the caveat that they should include a supervision piece in order to be most effective at protecting children); Huntington, *supra* note 268, at 1531–33 (endorsing the effectiveness of programs like the Nurse–Family Partnership). The controversy over the Obama Administration's 2010 budget earmark for additional funding for nurse home-visiting as a cost-effective family support illustrates the flawed parenthood framework again. Some Republicans derided the program as “billions for babysitters.” Cheryl Wetzstein, *Obama Plan Funds Nurse Visits to New Moms*, WASH. TIMES (D.C.), Jan. 12, 2010, at A1.

In addition to being preventive, the most effective child maltreatment interventions are holistic, looking at children and parents within the context of their families and communities. Such an approach allows for an assessment of a family's needs as well as its strengths, and it recognizes the impact of context on child maltreatment. Accordingly, rather than aiming to "fix the parent"²⁸⁶ the system would aim to support the family so that the child could be raised safely by loving adults. This approach not only reduces the likelihood of bias, because it avoids blame in favor of forward-looking solutions, but is also more individualized. Differentiating among the various risk factors or treatment needs of families is much more effective than the current "cookie cutter" service plans parents must meet for reunification.²⁸⁷ This holistic view works well with a preventive approach, as both focus on the larger communal or social context of child maltreatment rather than on the punishment of individuals.

A holistic approach to child welfare interventions also comports with current mental health approaches to families, such as "family systems" theory.²⁸⁸ Family systems theory posits that an individual cannot be understood, or effectively treated, outside of the context of his or her family and personal relationships.²⁸⁹ It recognizes the interdependence and emotional connectedness of families, even where members are in conflict or live apart. Moreover, a family systems approach eschews blaming just one individual for a particular problem, looking instead at the complex interaction of environment and risk factors giving rise to a particular situation.²⁹⁰

The use of family group decision-making structures is one promising sign of a more holistic approach to child maltreatment.²⁹¹ Family group conferencing engages the extended family, often including friends and other community members who are not blood relatives, in problem-solving to address risks to child safety.²⁹² This model can be used both preventively for cases not yet in the court system and to divert cases al-

²⁸⁶ See Annette R. Appell, *Protecting Children or Punishing Mothers: Gender, Race, and Class in the Child Protection System*, 48 S.C. L. REV. 577, 605 (1997) (discussing the focus of the child welfare system on fixing and punishing individual parents).

²⁸⁷ See Clare Huntington, *Missing Parents*, 42 FAM. L.Q. 131, 140 (2008) (suggesting a problem-solving model in child welfare which would "differentiate among cases," thereby providing more effective assistance to parents).

²⁸⁸ Susan L. Brooks, *A Family Systems Paradigm for Legal Decision Making Affecting Child Custody*, 6 CORNELL J.L. & PUB. POL'Y 1, 3 (1996).

²⁸⁹ *Id.* at 4.

²⁹⁰ *Id.* at 5.

²⁹¹ See, e.g., Pat McElroy & Cynthia Goodsoe [sic], *Family Group Decision Making Offers Alternative Approach to Child Welfare*, YOUTH L. NEWS, May-June 1998, at 1.

²⁹² See Huntington, *supra* note 16, at 678-80 (detailing family group conferencing (FGC)).

ready being adjudicated.²⁹³ This model engages the family in addressing its own challenges, thereby identifying strengths and mobilizing previously unrecognized resources, and eschewing blame in favor of formulating solutions for the child care.²⁹⁴ Such programs are being used in some communities and show potential to prevent further child maltreatment while also reducing court involvement and intervention in the family.²⁹⁵ There is also some evidence that the use of family group decision-making can reduce racial disparities in the child welfare system, perhaps because the intensive process helps decision-makers to assess cases based on individual characteristics rather than stereotypes.²⁹⁶ Finally, family group decision-making engages parents in the process, helping to overcome some of the internalized self-blame and low self-worth that impede many parents from changing.²⁹⁷

2. *Expanding Our Concepts of Permanency and Parenthood*

Shifting the narrative on child maltreatment also requires expanding our notions of permanency and parenthood. To this end, we can be informed by the parsing out of parenthood in private family law and by data on the myriad ways in which parents and children are connected. Permanency in the legal system has been connected to an idealized family structure, synonymous with adoption under ASFA. Relatedly, parents who are flawed or unable to care for their children have been designated non-parents, with no residual rights or connections to their children. This framework is both starkly different from the reality of children's and parents' experiences, and fundamentally misguided as a normative policy matter.

The current concept of permanency in public family law is much too narrow. A legalistic notion of permanency, limited to birth or adoptive parents, is prioritized over the psychological understanding of permanency as "an enduring relationship that arises out of feelings of belongingness."²⁹⁸ The former definition of permanency underlies the rule-out provisions of most subsidized guardianship programs and the similar requirement in reinstatement statutes that the child be deemed unlikely to be adopted.²⁹⁹

This framework, however, overestimates the legal permanency of adoption and undervalues children's views. Adoptive placements disrupt

²⁹³ Susan M. Chandler & Marilou Giovannucci, *Family Group Conferences: Transforming Traditional Child Welfare Policy and Practice*, 42 FAM. CT. REV. 216, 217 (2004).

²⁹⁴ See Huntington, *supra* note 16, at 678–79.

²⁹⁵ See *id.* at 680–85; Chandler & Giovannucci, *supra* note 293, at 218.

²⁹⁶ Allen & Davis-Pratt, *supra* note 213, at 77.

²⁹⁷ See Chandler & Giovannucci, *supra* note 293, at 219.

²⁹⁸ Testa, *supra* note 197, at 499.

²⁹⁹ See *supra* Part III.A.1. Judges in child maltreatment cases also prioritize this narrow definition of permanency. See Sullivan, *supra* note 267 (discussing NCJFCJ guidelines).

and adoption fails at not insignificant rates. Studies have consistently found that adoptions disrupt (the placement fails before the adoption is legally finalized) at rates of 10 to 25%.³⁰⁰ And adoptions dissolve or fail after they are finalized at rates of 3 to 15%.³⁰¹ (This statistic is likely an underestimate as name changes and other correlations to adoption make tracking dissolutions very difficult).³⁰² In fact, adoption failure rates are comparable to those of subsidized guardianships where the subsidy rates are the same.³⁰³

Such disruptions can be devastating to the children involved, all the more so because they were often promised that adoptions were always and absolutely final.³⁰⁴ The frequency of failure, particularly among older children, has led many youth to become skeptical about adoption as permanent; they recognize that it “is not a cure-all,” and brings its own problems.³⁰⁵ As one young woman put it:

I didn't wanna be adopted because I knew that [it] wouldn't benefit me. . . . I definitely wanted the relationship. [But] to me being adopted doesn't necessarily mean you're gonna have a good relationship. . . . It's just a paper that says you belong to someone. . . . [W]hat's on paper isn't what's important to me.³⁰⁶

A psychological definition of permanency would reflect how children themselves view their home and family, which is important, since children are the intended recipients of permanency under ASFA. Chil-

³⁰⁰ CHILD WELFARE INFO. GATEWAY, ADOPTION DISRUPTION AND DISSOLUTION: NUMBERS AND TRENDS 2 (2012), http://www.childwelfare.gov/pubs/s_disrup.pdf.

³⁰¹ *Id.* at 6; see also Susan Scarf Merrell, *Adoption's Dirty Secret*, DAILY BEAST, (Apr. 17, 2010), <http://www.thedailybeast.com/articles/2010/04/17/adoptions-dirty-secret.html>.

³⁰² This has led parents' advocates and others to call for a comprehensive study of adoption failure. Posting of David Lansner, dlansner@lanskub.com, to childparentsattorneys@mail.americanbar.org (July 11, 2011) (on file with author); see also Dawn J. Post & Brian Zimmerman, *The Revolving Doors of Family Court: Confronting Broken Adoptions*, 40 CAP. U. L. REV. 437 (2012) (outlining the under-documented problem of failed adoptions from the foster care system).

³⁰³ See *supra* Part II.A.1.

³⁰⁴ See, e.g., Meribah Knight, *Failed Adoptions Create More Homeless Youths*, N.Y. TIMES, Dec. 29, 2011, at A19 (telling the story of one youth who was devastated when his adoptive mother of 12 years abandoned him at age 17, shortly before the end of her subsidy for his care); see also OREGON REPORT, *supra* note 187, at 96 (quoting one youth who was adopted twice out of foster care: “Kind of weird. It's not that permanent. I didn't even know that could happen [that it could end].”).

³⁰⁵ Natasha Santos & Pauline Gordon, *Teens [sic] Feelings Must Be Safeguarded During the Adoption Process*, REPRESENT, May/June 2004, reprinted in CTR. FOR THE STUDY OF SOC. POLICY & URBAN INST., INTENTIONS AND RESULTS: A LOOK BACK AT THE ADOPTION AND SAFE FAMILIES ACT 46 (2009), available at http://www.urban.org/UploadedPDF/1001351_safe_families_act.pdf.

³⁰⁶ Gina Miranda Samuels, *Ambiguous Loss of Home: The Experience of Familial (Im)permanence Among Young Adults with Foster Care Backgrounds*, 31 CHILD. & YOUTH SERVICES REV. 1229, 1234 (2009) (first and second alterations and first omission in original).

dren think of permanency not as defined by law, but in terms of relationships, including feeling “safe” and loved, and being treated with acceptance, trust, and respect.³⁰⁷ Under this psychological definition of permanency, studies show there is no difference between children being adopted or children being cared for by a guardian.³⁰⁸ Nor is there a difference for their caregivers; sometimes guardians were not even aware of the legal distinctions between guardianship and adoption, but were committed to providing a permanent home and the children in their care felt it.³⁰⁹ Reframing permanency in psychological rather than legal terms would also increase the number of children exiting foster care to stable and lasting homes since families would have a broader array of options to choose from.³¹⁰ Finally, an expanded understanding of permanency would acknowledge a greater diversity of family forms, especially the extended family and cooperative caregiving historically common in African-American and Native American communities.³¹¹

Parenthood in the public realm similarly requires remapping in order to recognize the influence of key adults in children’s lives and equally respect all family forms. As outlined earlier, children’s relationships with parents and caregivers are not all or nothing.³¹² On the contrary, they are complex, nuanced and inclusive. Children value and continue to engage in relationships with their biological parents even when they are in other secure living arrangements, despite the lack of any legal framework to accommodate these relationships.³¹³ In sum, forcing a choice between “old” biological parents and “new” adoptive parents neither reflects reality nor furthers children’s interests.

Recognition of a network of adults important to a child should replace this false dichotomy: an expanded vision of parenthood would reflect the continuum of adults with whom children in the child welfare system have relationships.³¹⁴ To this end, the role of both birth parents and custodians or caregivers should be recognized. Numerous scholars have called for an expanded understanding of parenthood and greater

³⁰⁷ OREGON REPORT, *supra* note 187, at 95–96. For many young people, subsidized guardianship seems more “normal” than adoption, in large part because they do not have to sever ties with their biological parents and take on “new” parents. *Id.* at 95.

³⁰⁸ See Testa, *supra* note 197, at 525.

³⁰⁹ Bissell & Kirana, *supra* note 209, at 16.

³¹⁰ See Testa, *supra* note 197, at 533 (showing an increase in permanency when caregivers were offered a choice between adoption and subsidized guardianship).

³¹¹ See Susan L. Brooks, *The Case for Adoption Alternatives*, 39 FAM. CT. REV. 43, 44 (2001); Schwartz, *supra* note 110, at 456; OREGON REPORT, *supra* note 187, at 34.

³¹² See *supra* Part I.B.2.b.

³¹³ See Samuels, *supra* note 306, at 1229, 1233–37.

³¹⁴ Similarly, kin should be broadly defined for purposes of subsidized guardianship or other kinship care frameworks, to respect families as they actually are.

disaggregation of rights in the private family law realm.³¹⁵ These suggestions are often based upon a functional definition of parenthood, and a desire to recognize caregivers beyond biological parents.³¹⁶ I support these arguments but I am, in a sense, making the inverse argument: that even where biological parents are not a child's caregivers, children still usually desire and benefit from contact with them and should be allowed this contact. This is particularly true for older children who have had more previous contact with or memories of a parent, but also true for children who may not know their biological parents very well.³¹⁷ Moving beyond a narrow conception of parenthood to recognize the multiple adults present in the lives of many children in foster care will lead to better policies, particularly for older youth.³¹⁸

Given this, parental contact and rights should be completely terminated only in the rarest of circumstances, and the default should shift to favor contact even when children are in other homes, whether they be foster homes, adoptive homes, or other custodial arrangements.³¹⁹ Visitation between parents and children in the child welfare system should be prioritized, even after the child is in another seemingly permanent living situation, rather than doled out sparingly and under unfavorable conditions.

Equally significantly, parental rights should be parsed out in the public law context as they are in the private law context.³²⁰ For instance, parents should still retain rights to involvement in decisions about their children even when their children are removed from their care. Although parents of children in foster care sometimes retain educational and medical decision-making powers in theory,³²¹ this often is not en-

³¹⁵ See, e.g., Katherine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879 (1984); see also Jacobs, *supra* note 18, at 313 (advocating for recognition of more than two parents in more cases).

³¹⁶ In fact, these arguments underlie a recent California proposed state statute allowing for more than two legal parents. S.B. 1476, 2011–2012 Leg., Reg. Sess. (Cal. 2012). The bill passed under both the Senate and the State Assembly, but was ultimately vetoed by Governor Jerry Brown in September. *Id.*; *Jerry Brown Vetoes Bill Allowing More than Two Parents*, SACRAMENTO BEE (Sept. 30, 2012), <http://blogs.sacbee.com/capitolalertlatest/2012/09/jerry-brown-vetoes-bill-allowing-more-than-two-parents.html>. The bill arose in response to a case where a child was placed in foster care because her biological father, the adult who was willing and able to care for her, would have been her third legal parent. *California Bill Would Allow Children to Have More than Two Parents*, NBC NEWS (July 3, 2012), http://usnews.nbcnews.com/_news/2012/07/03/12543099-california-bill-would-allow-children-to-have-more-than-two-parents.

³¹⁷ See *supra* Part I.B.1.b.

³¹⁸ See FREUNDLICH, *supra* note 102, at 19.

³¹⁹ As noted earlier, most European systems terminate parental rights far less frequently than the American system. See *supra* note 261 and accompanying text.

³²⁰ See Parkinson, *supra* note 38, at 247 (discussing the move towards parenting plans and parenting time rather than more rigid custody arrangements).

³²¹ See, e.g., CAL. GOV'T CODE § 7579(a) (2012) (allowing for a limitation of the educational rights of children in foster care separately from the limitation of other

couraged or even permitted in practice.³²² Parental rights do not have to be equally parsed out; rather, they could be disaggregated at various levels depending upon the roles and capabilities of the adults involved.³²³

An “*additive*, rather than *substitutive*”³²⁴ framework of parenthood would bring the vision of parenthood into line with the reality of families and relationships and treat all families equally. Most families do not conform to the dyadic parental model which dominates our socio-legal system, and children in foster care are, obviously, particularly far from this norm. Similarly to an expanded notion of permanency, such a framework would incorporate children’s visions of their relationships with parents and other adults, according respect to their attachments and to all adults in relationships with children. An expanded recognition of parenthood would also ameliorate the problematic expressive effects of ASFA and related laws which render flawed parents to be non-parents.³²⁵ By bringing the necessary flexibility to respond to the needs and attachments of each individual child and family, the framework would embrace a multiplicity of family forms, rather than stigmatizing or ignoring those who depart from the normative ideal.

This expanded vision of permanency and parenthood would reduce the myopic focus on adoption and permit a range of equally valued custodial options, including subsidized guardianship and other less formalized arrangements.³²⁶ It would also recognize and support the parent-child relationship even where parents are not able to care for their children. There are some signs for guarded optimism about such a shift in vision. For instance, the recent Fostering Connections Act allows states to fund subsidized guardianship and provides for “family connection grants” to states for youth aging out of foster care to be in touch with

rights); N.Y. COMP. CODES R. & REGS. tit. 8, § 200.5 (2012) (granting parents education rights in some circumstances even when children are in foster care).

³²² See Ryznar & Park, *supra* note 93, at 163–64.

³²³ See Jacobs, *supra* note 18, at 334–35 (suggesting a framework with various levels of rights). This framework is permissible under the ALI Recommendations as well. *Id.* at 333–34.

³²⁴ See Sacha M. Coupet, “*Ain’t I a Parent?*”: *The Exclusion of Kinship Caregivers from the Debate Over Expansions of Parenthood*, 34 N.Y.U. REV. L. & SOC. CHANGE 595, 635 (2010).

³²⁵ See Susan Frelich Appleton, *Parents by the Numbers*, 37 HOFSTRA L. REV. 11, 58 (2008) (recognizing that the expressive value of the term parent leads many kinship caregivers to forego adoption for guardianship so that the original parent continues to be recognized).

³²⁶ These could include subsidized guardianship and open adoption. See Brooks, *supra* note 311, at 44; Schwartz, *supra* note 110, at 443 (advocating subsidized guardianship); ANNIE E. CASEY FOUND. & CASEY FAMILY SERVS., SUBSIDIZED GUARDIANSHIP: COLLABORATING TO IDENTIFY NEW POLICY OPPORTUNITIES 1–2 (2006) (on file with editor) (identifying a range of legally permanent options for children in foster care including guardianship in addition to adoption and reunification).

their extended families.³²⁷ Nonetheless, as I have pointed out, guardianship is still not funded to the same degree as adoption and most states still do not mandate such connections, nor carry them out in practice.

More interestingly, some child welfare agencies are exploring new ways for youth to achieve permanency, including finding adults to serve as role models or connections for youth, even if they are not custodial resources.³²⁸ It would be preferable for all youth to have a family setting to live in, but recognizing the importance of even non-custodial adult support is an important step beyond the adoption hegemony. Finally, some agencies are also exploring ways to balance the youth's old and new family connections, such as open adoption.³²⁹ Enabling youth to maintain both their old and new families, including parents, siblings and other relatives, increases the number of youth willing to be adopted and reflects the reality of many family structures.³³⁰

B. Concerns

A new approach to public parenthood and child maltreatment is not without potential drawbacks. Below I will address some criticisms this paradigm shift may raise: that it invades family autonomy, that it stigmatizes certain types of families and that it would be overly costly or politically unviable. I will also address concerns about the instability of redefining permanence and the boundaries of an expanded notion of parenthood.

A more preventive or holistic approach to child maltreatment is sometimes criticized as an impermissible invasion of family autonomy.³³¹ As noted above, parents are accorded strong rights to raise their children and state intervention in that regard may be deemed an impermissible autonomy violation. However, this is not a drawback to a preventive ap-

³²⁷ Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No. 110-351, sec. 102, § 427, 122 Stat. 3949, 3953–54.

³²⁸ See Alice Bussiere, *Permanence for Older Foster Youth*, 44 FAM. CT. REV. 231 (2006) (outlining different innovations California is making in this regard).

³²⁹ See FREUNDLICH, *supra* note 102, at 20.

³³⁰ See Bussiere, *supra* note 328, at 238–39; see also Jennifer Macomber, *The Impact of ASFA on the Permanency and Independence for Youth in Foster Care*, in CTR. FOR THE STUDY OF SOC. POLICY & URBAN INST., INTENTIONS AND RESULTS: A LOOK BACK AT THE ADOPTION AND SAFE FAMILIES ACT 83, 88 (2009), http://www.urban.org/UploadedPDF/1001351_safe_families_act.pdf (recommending further exploration of open adoption as an option for older youth in foster care).

³³¹ Opponents of more holistic approaches to child maltreatment have raised related concerns that family group conferencing and similar mechanisms may infringe upon parental autonomy via due process violations. See Huntington, *supra* note 16, at 685–86. Scholars have raised particular concerns about these methods when mothers are victims of domestic violence. Family group conferencing, however, is successfully used in such cases in many countries, including New Zealand. *Id.* In contrast, many American jurisdictions exclude cases involving domestic violence or more severe abuse. See Chandler & Giovannucci, *supra* note 293, at 222–23.

proach to child maltreatment for several reasons. First, as scholars have pointed out, the line between state intervention and autonomy is a false one, and in fact the state intervenes all of the time to shape, support, or otherwise direct families.³³² This is certainly true of parents who become involved in the child welfare system, whose conduct is excessively scrutinized after the initial contact.³³³ The key question is *when* and *how* the state intervenes. A preventive approach would not increase state intervention in the lives of at-risk families. Instead, it would move the point of intervention to be less punitive and more effective.

Moreover, a preventive public health approach is often voluntary, and this is likely the best starting approach.³³⁴ Thus, for instance, successful home nurse visiting programs have usually been voluntary. Public education can encourage participation, particularly in high-risk communities, and experience demonstrates that individuals are willing to seek or accept help when it is offered in a non-stigmatizing and non-punitive way. Preventive programs, especially if they are broadly offered, signal that it is acceptable to ask for help in parenting.³³⁵

A second possible critique of preventive approaches is that if offered to only certain communities, they will stigmatize certain kinds of families. The fact that parents in the child welfare system are already overwhelmingly marginalized by race and class undercuts this argument. As I have argued in this Article, the child welfare system is already stigmatizing certain kinds of families, resulting in a two-tiered parenthood system.

Ideally, a preventive program would be universal to avoid any further stigma. But even if that is economically or politically unfeasible,³³⁶ a pub-

³³² See, e.g., Huntington, *supra* note 268, at 1489. The state intervenes in families in ways even more invasive than family law, such as criminal law. See I. Bennett Capers, *Home Is Where the Crime Is*, 109 MICH. L. REV. 979 (2011) (book review) (outlining the fact that criminal law has always invaded the home, particularly in the case of non-normative families).

³³³ See *supra* Part I.B.2.a.

³³⁴ See Lawrence O. Gostin et al., *The Law and the Public's Health: A Study of Infectious Disease Law in the United States*, 99 COLUM. L. REV. 59, 94 (1999) (noting that successful public health programs usually involve voluntary compliance); see also Elizabeth Bartholet, *Race & Child Welfare: Disproportionality, Disparity, Discrimination: Re-Assessing the Facts, Re-Thinking the Policy Options*, HARVARD L. SCH. 9 (JUL. 2011), <http://www.law.harvard.edu/programs/about/cap/cap-conferences/rd-conference/rd-conference-papers/rdconceptpaper-final.pdf> (noting that voluntary early intervention programs are disproportionately used by African-American families, who are among the most low-income families, and that these services provide the most benefit for the most disadvantaged families).

³³⁵ See Wilson, *supra* note 39, at 311 (noting that divorcing couples who were offered parent education programs often subsequently sought out other supports since seeking help had been normalized); see also Marsha Garrison, *Taking the Risks Out of Child Protection Risk Analysis*, 21 J.L. & POL'Y 5 (2012) (pointing out the dangers of using risk-assessments to make decisions in individual child welfare cases).

³³⁶ A universal program may in fact be more politically feasible given it would not be seen as a "handout" to low-income people. See Ron Haskins et al., *Social Science Rising: A Tale of Evidence Shaping Public Policy*, FUTURE OF CHILDREN 6 (Fall

lic health approach to child maltreatment would still be far less stigmatizing than the current system. A public health approach is, by definition, community-wide in scope and based on objective risk factors rather than judgment about an individual parent's conduct without recognition of the environmental factors underlying much parenting behavior. I am not arguing that parents should be individually investigated for child maltreatment based on their inclusion in an at-risk category.³³⁷ A risk-based approach is not an appropriate rubric for dealing with individual cases of misconduct; it works from a preventive standpoint only. Instead, the data on risks for child maltreatment can be used to target scarce resources and focus the provision of services. Finally, as scholars have pointed out, some trade-off between a preventive approach to social problems such as child maltreatment and a level of group categorization by risk factors is inevitable.³³⁸ The same approach is being taken to other public health issues, such as smoking and obesity. Child maltreatment should be no different.

Perhaps the most salient criticism of preventive child maltreatment programs is that they are politically unviable. Some argue this is so because of their costs. Although preventive programs require resources, they are undoubtedly less costly than the child welfare system, particularly a system that proposes terminating and then reinstating parental rights after children have been in foster care for years.³³⁹ Even more significantly, preventing even a small measure of child maltreatment will result in significant cost savings in the long term, as child maltreatment brings with it great social costs.³⁴⁰ The more convincing argument is that the American ethos of self-sufficiency, the same ethos that helps shape the narrative of bad parent, means that preventive programs will be seen as anti-poverty programs and thus not popular.³⁴¹

2009), http://www.futureofchildren.org/futureofchildren/publications/docs/19_02_PolicyBrief.pdf.

³³⁷ See Wilson, *supra* note 39, at 320 (similarly arguing for the use of risk-based factors for sex abuse, including divorced parents, to be used to formulate prevention efforts, but not to allocate custody in an individual case).

³³⁸ See *id.* at 321.

³³⁹ See Chandler & Giovannucci, *supra* note 293, at 222 (noting that the family group conferencing programs either save costs or add no new costs to the child welfare system); APA, *supra* note 8, at 16 (outlining the cost-effectiveness of child maltreatment prevention programs, and citing one program that cost only \$12.74 per child and another preventive program that resulted in savings of \$5.07 for every dollar invested); Olds et al., *supra* note 283, at 5 (noting that the nurse-family partnership home visiting program cost between \$2,800 and \$3,200 per family in 1998, which is less than the over \$5,000 cost of foster care per child, even in today's dollars).

³⁴⁰ See *supra* note 87 and accompanying text.

³⁴¹ See, e.g., BARTHOLET, *supra* note 15, at 238–39 (“Sadly . . . we can . . . predict that our society will continue to scrimp on the support services that it makes available to poor people, including those at risk for child maltreatment.”).

This ethos remains a formidable barrier to changing our approach to child maltreatment. However, several factors make now a potentially promising time to shift the paradigm. First, there is a growing recognition that ASFA has created new problems, such as the large number of legal orphans, and that its successes have come at great cost to many children and to society as a whole.³⁴² A clear indication of an acknowledgement that ASFA's framework is flawed is the rush by states to enact reinstatement statutes,³⁴³ which are both inefficient and contradictory to ASFA's mandate. Second, there has been heightened public attention recently to the strains the failing economy has put on children and families.³⁴⁴ Third, the increasing shift in other fields, such as medicine and public health, to a view of child maltreatment as a preventable social problem can be a valuable source of input and collaboration for policy-makers.³⁴⁵ Finally, even if it is true that adequate funding of supports for families, particularly low-income families, is still not politically feasible, discussion of the flawed child welfare public policy story can at least bring transparency. Knowledge about the embedded biases and mistaken assumptions underlying the system help in the assessment of new policy trends such as subsidized guardianship and reinstatement of parental rights.³⁴⁶

Critics of expanded permanency and parenthood frameworks raise two main points: that reliance on arrangements other than adoption leaves children too vulnerable to challenges by birth parents or other forms of disruption, and that parsing out parenthood rights blurs the boundaries to an unworkable degree.³⁴⁷ The first criticism exaggerates the vulnerability of guardianships to legal challenge because, in fact, biological parents rarely challenge guardianships.³⁴⁸ If they do, they must demonstrate the high standard of changed circumstances.³⁴⁹ In any event, such concerns can be addressed by structuring guardianships to be more secure against such challenges. For instance, certain states, including New Jersey and North Carolina, have amended their statutes to make it

³⁴² See, e.g., Allen & Davis-Pratt, *supra* note 213.

³⁴³ See *supra* Part IV.B.1.

³⁴⁴ See, e.g., Cristina Silva, *Study: 1 in 5 American Children Lives in Poverty*, NBC NEWS (Sep. 22, 2012), http://www.msnbc.msn.com/id/44171347/ns/us_news-life/t/study-american-children-lives-poverty/#.UHJSCIFAW7s.

³⁴⁵ See *supra* Part IV.A.1.

³⁴⁶ The most pragmatic approach would be for the government to fund a variety of demonstration programs and assess their effectiveness. Home nurse visiting and family group conferencing are two promising areas which are being funded to some degree, and which can open the way for funding of other effective prevention programs.

³⁴⁷ See Patten, *supra* note 282, at 255, 270; Schwartz, *supra* note 110, at 462.

³⁴⁸ See Patten, *supra* note 282, at 261.

³⁴⁹ See, e.g., *State ex rel. Johnson v. Bail*, 938 P.2d 209, 212, 214 (Or. 1997).

more difficult to overturn guardianships.³⁵⁰ Most significantly, this viewpoint obscures the reality that any parent, adoptive or otherwise, is vulnerable to third party custody suits and that no family setting is ever truly permanent—any parent–child arrangement is open to legal challenge, and death, divorce, and other traumatic events unfortunately reshape families all the time.³⁵¹

Fears about a more nuanced public parenthood framework are also unwarranted. First, the data clearly show that parents and children aging out of foster care or in other permanent homes are often already in contact.³⁵² Adapting the legal framework to reflect this reality would simply make such contact simpler and more transparent. Second, although such a disaggregation of rights is more complicated than the current all-or-nothing framework, it has existed for some time in the private family law sector. Courts in custody matters routinely parse out parental rights and responsibilities such as decision-making powers, joint physical custody and visitation.³⁵³ The ALI Principles of Family Dissolution, for instance, posit a framework where a biological parent may not be a legal parent but has parental rights and responsibilities pursuant to an agreement with the legal parent(s).³⁵⁴

The same division of responsibilities among multiple parental figures could occur in families involved with the child welfare system.³⁵⁵ In fact, this recognition of multiple parental figures occurs already for some families involved in the child welfare system, as a child may be placed in the custody of one set of adults, while another retains decision-making powers over her. Some families also practice cooperative parenting, sharing responsibilities among the biological parents and other caregivers, usually in kinship foster care or subsidized guardianship cases.³⁵⁶

³⁵⁰ ALLEN & BISSELL, *supra* note 203, at 6; *Overview, in USING SUBSIDIZED GUARDIANSHIP TO IMPROVE OUTCOMES FOR CHILDREN* 3, 5 (Mary Bissell & Jennifer L. Miller eds., 2004), available at <http://www.childrendefense.org/child-research-data-publications/data/using-subsidized-guardianship-improve-outcomes.pdf>.

³⁵¹ Youth themselves recognize this truth. See OREGON REPORT, *supra* note 187, at 95 (youth reporting that opportunities for permanency exist in adoption, subsidized guardianship, and even foster care, but that none guarantee absolute permanency). The fluidity of families underlies the exception to the finality of judgments rule in custody cases, where custody may be altered for a material change in circumstances. See *Bail*, 938 P.2d at 212; LESLIE JOAN HARRIS ET AL., *FAMILY LAW* 684 (4th ed. 2010) (noting that the changed circumstances exception is “almost universal”).

³⁵² See *supra* notes 100–03 and accompanying text.

³⁵³ Coupet, *supra* note 324, at 641 & n.201.

³⁵⁴ AM. LAW INST., *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS* § 2.04 (2002).

³⁵⁵ There is no reason to presume a greater level of conflict between a foster or adoptive parent and a birth parent than between two divorcing spouses. See Garrison, *supra* note 22, at 383–84.

³⁵⁶ See OREGON REPORT, *supra* note 187, at 71; see also Coupet, *supra* note 324, at 604 & n.27, (discussing how kinship caregivers often collaborate with parents to share

CONCLUSION

The child welfare system is both dysfunctional and fundamentally unfair, in large part because it relies on a flawed public policy story about parenthood. Addressing child maltreatment effectively requires a deliberate acknowledgement of its actual causes, not a quick or simplistic blaming of non-normative parents. This Article has started the process of identifying those actual causes, but it is inevitably only a start. Numerous aspects of the child welfare system deserve further study. Comprehensive data collection on the reasons for children's removal from their parents, for example, could lead to an honest assessment of the harm, if any, to children from non-normative parental conduct, as well as to a more precise measurement of the impact on families of shortages of child care, housing, and other resources.³⁵⁷ This data could also bring to light largely overlooked correlations in the child welfare statutory regime—between poverty and neglect, for instance—and thereby counteract common implicit biases about particular families. Simply telling the real story of child maltreatment would also reduce the stigma of families who need assistance, as virtually every family sometimes does.

More research is likewise needed on different approaches to permanency, parenthood, and the various custodial arrangements for families involved with the child welfare system. Broadening our conceptions of permanency and parenthood could well allow for the recognition of a variety of parent-child bonds and the essential understanding that all family relationships are complex and somewhat fragile. We know already that children, their parents, and other adults are currently living and connected in a multiplicity of settings beyond foster care and adoption. Moving beyond the "all or nothing" public parenthood story would accord with the reality of families, a stated goal of family law, and help to bridge the public and private family law systems. Only with such a shift can we begin a dialogue to respect a variety of families while also achieving the public's goal of protecting children. This Article is an attempt to start that conversation.

childrearing responsibilities). Yet it often occurs outside the ambit of the child welfare agency and court, and usually not in the adoption context.

³⁵⁷ As noted earlier, there has been little study of why children are actually removed to foster care, and broad and vaguely worded neglect statutes allow for wide and subjective interpretations. See *supra* Part II.B.2.a. Attention is beginning to come to this issue, as evidenced for instance in the study of removals in Washington D.C., see *supra* notes 65–66 and accompanying text. However, much work remains to be done.